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U.S. STEEL CORP.*

50 IBLA 190

Decided *September 30, 1980*

Appeals from decisions of the Utah State Office, Bureau of Land Management, requiring reimbursement of costs incurred in processing rights-of-way applications. FJ 14 U-35675 through U-35680.

Affirmed in part, reversed in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Applications—Rights-of-Way: Federal Land Policy and Management Act of 1976

The Federal Land Policy and Management Act of 1976 authorizes the Bureau of Land Management to recover reasonable costs including costs of environmental analyses for applications of rights-of-way across public lands.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Applications—Rights of-Way: Federal Land Policy and Management Act of 1976

Costs not directly associated with processing or monitoring of a right-of-way application, such as evaluation of the mine to be served by the rights-of-way, are not authorized by the Federal Land Policy and Management Act of 1976 and are not reimbursable pursuant to 43 CFR 2802.1–2.

3. Accounts: Fees and Commissions—Accounts: Payments—Rights-of-Way: Applications

Management overhead costs are not a reimbursable cost recoverable from right-of-way applicants under 43 CFR 2802.1–2.

APPEARANCES: Erie V. Boorman, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

United States Steel Corp., appeals from decisions of the Utah State Office, Bureau of Land Management (BLM), requiring reimbursement of costs of processing right-of-way applications.

On Nov. 9, 1976, appellant made application for five rights-of-way over Federal land to service the B-Canyon Coal Mine Project in Utah. Appellant's applications were for a telephone line (U–35676), tram road (U–35677), railroad (U–35678), water pipeline (U–35679) and powerline (U–35680) rights-of-way. In addition, appellant applied for a special land use permit (SLUP) covering 480 acres to be used as the site for the surface facilities and buildings to support the mining operation. Appellant submitted a total of $2,260 with the applications pursuant to 43 CFR 2802.1–2(a)(3).

By letter of Feb. 1, 1977, appellant was notified that the statutes under which the applications were made had been repealed by secs. 705(a) and 706(a) of the Federal

*Not in chronological order.

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Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792–93. Appellant was informed that processing of the right-of-way applications would continue under the authority and requirements of Title V of FLPMA, 43 U.S.C. §§ 1761–71 (1976). Appellant specifically stated that it had no objection to amending the applications to conform to FLPMA. BLM informed appellant that, while processing of the SLUP would continue under FLPMA, BLM would hold the application until regulations concerning temporary use permits are promulgated.

On Feb. 9, 1977, BLM informed appellant that it is required to reimburse the United States for the cost of processing right-of-way permit appplications, including preparation of reports and statements concerning the impact of the proposal upon the environment. The letter states that it was issued in accordance with 31 U.S.C. § 483a (1976), FLPMA, and 43 CFR Subpart 2802. The letter continues:

> Based on available information and today's prices, the total estimated cost for processing the rights-of-way associated with your project is $50,000.
>
> As required by 43 CFR 2802.1–2(a)(4), we estimate our initial costs for February 1, 1977 through April 30, 1977, to be $27,260.00. Therefore, a bill for $25,000 is enclosed to cover our costs less $2,260 paid as filing fees.

Appellant paid the $25,000 and filed a notice of appeal as provided for in the letter of Feb. 9, 1977. On Sept. 1, 1977, BLM wrote appellant a letter to explain the new requirements for reimbursement of Federal costs incurred with the processing of right-of-way applications. Reference was made to P.L. 95–26, 91 Stat. 61 (May 4, 1977) and P.L. 95–74, 91 Stat. 285 (July 26, 1977) which provide for the expenditure of funds collected under secs. 304(a), 304(b), 305(a), and 504(g) of FLPMA, 43 U.S.C. §§ 1734, 1735, and 1764 (1976). A new accounting system, commencing Oct. 1, 1977, was established to process the funds. The letter stated that all cost recoverable work can be funded only from the new account. The letter went on to state: "This means that the deposits must be on hand to pay for the work *or the work must stop because BLM has no other funding source.*" (Italics in original.) Appellant was billed $10,000 for estimated costs for the period Oct. 1, through Dec. 31, 1977. Appellant paid the amount and filed a second notice of appeal.

On Mar. 17, 1978, appellant was billed $5,000 for what was described as "costs for on-going situations, processing of the draft environmental impact statement and processing of rights-of-way associated with this project." The letter stated that unless the payment is received, all work on the B-Canyon Coal Mine Project will cease. Appellant paid the $5,000 and filed a third notice of appeal.

On appeal, appellant objects to all of the required payments, except the $2,260 paid as filing fees. The validity of the regulations and BLM's authority under the regulations to require appellant to reim-

burse the United States for the costs of processing the right-of-way applications are challenged by appellant on a number of grounds. Appellant specifically argues that:

(1) The decisions are unauthorized by any valid existing regulation and are therefore invalid.

(2) The decisions are based upon improper, invalid, or an absence of standards used in setting the amount.

(3) The amount was determined in an arbitrary and capricious manner or inconsistent with applicable law and therefore constitutes an abuse of discretion.

(4) The recovery of costs relating to environmental studies constitutes an unreasonable fee or tax in violation of 43 U.S.C. §§ 1371 and 1374 (1976).

(5) The amount is excessive and therefore unreasonable in violation of 43 U.S.C. §§ 1371 and 1374 and therefore not fair and equitable in violation of 31 U.S.C. § 483a (1976).

(6) The decisions are invalid in that a large portion of the costs incurred is for environmental analyses which are incurred for the benefit of the general public, not for the exclusive benefit of appellant and therefore constitute an invalid tax.

(7) The cost of monitoring the rights-of-way benefits the general public and is therefore an invalid tax.

(8) The indirect costs are invalid either as costs benefiting the public generally or as management overhead which is not recoverable.

(9) The charges for mine plan evaluation are neither authorized by statute nor reasonably related to the processing of the right-of-way applications.

[1] Regulation, 43 CFR Subpart 2802, amended in 1975 to require right-of-way applicants to bear the costs associated with processing of a right-of-way application was initiated under the authority of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483a (1976). Sec. 304 of FLPMA, 43 U.S.C. § 1734 (1976), specifically authorizes the Secretary of the Interior to establish "reasonable filing and service fees and reasonable charges, and commissions with respect to applications." Sec. 304(b) provides:

> The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended. As used in this section "reasonable costs" include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the govern-

ment processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

The cost recovery provisions of secs. 304 and 504(g) of FLPMA were implemented by Secretarial Order No. 3011, 43 FR 55280 (Oct. 14, 1977). The Secretarial order stated that the implementation shall apply to all appplications for rights-of-way over public lands which were pending on Oct. 21, 1976, or which have since been filed. The regulations at 43 CFR 2802.1–2 were specifically made applicable to applications for rights-of-way.[1]

Appellant's assertions that the regulations are invalid, that the recovery of costs relating to environmental studies constitutes an unreasonable fee or tax, and that the portion of the costs incurred for environmental analyses and monitoring of the rights-of-way benefits the general public rather than appellant and is therefore invalid, have been addressed and answered by the Court of Appeals for the Tenth Circuit in *Alumet* v. *Andrus*, 607 F.2d 911 (1979). In *Alumet* the court stated:

> Clearly, FLPMA is an express legislative mandate that all reasonable costs incurred by the Secretary in processing an application for rights-of-way on public lands shall be chargeable against the applicant for such rights-of-way, and further, that "reasonable costs" include, among other things, the costs of environmental impact statements. We shall assume that Congress was aware of its limitations in delegating the authority to "tax."

607 F.2d at 916.

The *Alumet* court did not address the issue of whether the full costs of an environmental statement (EIS) can be recovered from a right-of-way applicant. The court overturned the rule of the district court below that sec. 304 of FLPMA did not authorize the Secretary of the Interior to seek reimbursement from an applicant for *any* part of the costs of preparing an EIS. In *Colorado-Ute Electric Ass'n, Inc.*, 46 IBLA 35 (1980),[2] this Board following *Miss. Power & Light* v. *U.S. Nuclear Regulatory Comm.*, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 1066 (1980), held that BLM may recover the full costs of preparing environmental studies associated with right-of-way applications. Although neither *Colorado-Ute* nor *Miss. Power & Light* arose under FLPMA, the rationale of both cases is equally applicable in this instance. The environmental studies and reviews are an integral part of the right-of-way application and as such directly benefit the applicant in this instance.

Congress implemented the revolving account established in sec. 304

[1] Regulation 43 CFR Part 2800 was amended effective July 31, 1980. 45 FR 44518 (July 1, 1980). The reimbursement of costs section of the amended regulation is virtually unchanged from the regulation promulgated in 1975. Application of the amended version of the regulation to the facts presented by this appeal would not benefit appellant. *See Henry Ofe*, 64 I.D. 52, 55–56 (1957). It should be noted that order No. 3011 expired, by its own terms, when regulations were promulgated.

[2] Appeal pending, No. 80C–500 (D. Colo. Apr. 16, 1980).

(b) of FLPMA through the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1978, P.L. 95–74, 91 Stat. 285 (1977). The moneys collected under secs. 304(a), 304(b), 305(a), and 504(g) of FLPMA, are the only funds appropriated by Congress for processing right-of-way applications. This process of appropriation has been continued through fiscal year 1980 and is the only source of funds available for preparation of environmental impact statements associated with rights-of-way over Federal lands.

[2] Appellant contends that the charges for mine plan evaluation are neither authorized by statute nor reasonably related to the processing of the right-of-way applications. The record shows in the "calculation of costs" that mine plan evaluation comprises some $10,000 of the $50,000 total estimated costs. Appellant's contention on this point has merit. While recovery of all costs associated with right-of-way applications including the costs of preparing environmental studies is mandated by FLPMA, the same does not hold true for the cost associated with evaluating the base operation that the rights-of-way will serve which in this instance is the mine itself. 30 CFR 211.10 authorizes the regional director of the Office of Surface Mining to review and consider a proposed mining plan. To the extent that BLM was involved in evaluating the mine plan under 43 CFR Subpart 3041 (1978) [3] such review is not reimbursable under the right-of-way regulations since it does not pertain to the right-of-way application. The amount contributed to mine plan evaluation is to be refunded to the appellant pursuant to sec. 304(c) of FLPMA, 43 U.S.C. § 1734(c) (1976).

Appellant asserts that the calculation of costs was either determined in an arbitrary and capricious manner and/or based upon improper and invalid standards. The Feb. 9, 1977, BLM letter lists the following costs that are reimbursable:

1. Salary, per diem, and travel of all personnel involved in actual processing of applications, such as record keeping, field examination, adjudication, Environmental Analysis Reports/Environmental Impact Statements, etc.
2. Costs of contracts, fees of consultants, costs of public meetings and hearings, and costs of other special arrangements made to assist in the processing of the applications.
3. Purchase and hire of special materials and equipment, including photos, maps, data, etc.
4. Extra incremental costs incurred for accelerating planned cadastral surveys, Management Framework Plans, and field examinations for the benefit of the applicant.

The above costs are the type of costs contemplated by FLPMA and the implementing regulations. The amount charged is only that amount

[3] Regulation 43 CFR Subpart 3041 was deleted in its entirety and its provisions transferred to 30 CFR Chap. VII, 30 CFR Part 211, and 43 CFR Part 3460. 44 FR 42650 (July 19, 1979), *corrected* 44 FR 56340 (Oct. 1, 1979).

necessary to evaluate the right-of-way applications pursuant to FLPMA. There is no indication that BLM has utilized money from the revolving fund for other than proper purposes. It was not intended that there be a standard used in setting the amount, rather it was intended that the applicant bear the full costs of processing the right-of-way application.

[3] Appellant also challenges the indirect costs assessed against it as either invalid as costs benefiting the public generally or invalid as management overhead which is not recoverable by statute. The record does not show that indirect costs were factored into the computation of the amount of assessable costs billed to appellant, however, Organic Act Directive No. 77-65 dated Aug. 12, 1977, provides that "billings for costs recoverable work to be performed during the remainder of FY 1977 will continue to include 22% of direct costs to finance the applicable share of indirect costs." As was the case in *Colorado-Ute*, *supra*, we are unable to determine whether indirect costs were charged to appellant, and if so charged whether a portion of the indirect costs was a charge for "management overhead" which is not permissible. Accordingly, we remand the case to BLM for a determination whether indirect costs were factored into the costs charged to appellant and whether any of those costs were charges for management overhead. Of course, no indirect costs of any kind would be allowable as a surcharge to the $10,000 charged to the mine plan evaluation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for action consistent with this decision.

FREDERICK FISHMAN
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

FORD MacELVAIN

50 IBLA 303

Decided *October 7, 1980*

Appeal from decision of the California State Office, Bureau of Land Management, declaring null and void 105 mining claims situated on the outer continental shelf and refusing to record the notices of location submitted for such claims. CA MC 62288.

Affirmed.

1. Mining Claims: Lands Subject to—Outer Continental Shelf Lands Act: Generally

The Outer Continental Shelf Lands Act, *as amended*, 43 U.S.C. §§ 1331–56 (Supp. II 1978), provides the exclusive authority for the development of minerals on the outer continental shelf. Mining claims situated on the outer continental shelf

assertedly located pursuant to the placer provisions of the general mining law, 30 U.S.C. §§ 35–36 (1976), must be declared null and void.

2. Mining Claims: Recordation

It is proper to refuse to accept notices of location of mining claims submitted for recordation pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), when the claims are null and void because they are filed for lands on the outer continental shelf.

APPEARANCES: James D. Bell, Esq., Jackson, Mississippi, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Ford MacElvain has appealed from the Jan. 8, 1980, decision of the California State Office, Bureau of Land Management (BLM), declaring 105 mining claims null and void because they are situated on the outer continental shelf (OCS). The decision indicated that notices of location submitted for recordation pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), were being returned.

The notices of location generally assert the claims were located in 1968 pursuant to the provisions in the general mining law relating to placer claims. 30 U.S.C. §§ 35, 36 (1976). Appellant contends that the lands were then public lands subject to the mining laws, and as such they remain available for appropriation under the general mining law of 1872. He further contends that if they are not available at the present time, it is only by virtue of FLPMA, passed in 1976, a date subsequent to the date of location of the claims.[1]

[1, 2] These arguments are clearly without merit. The Outer Continental Shelf Lands Act, *as amended*, 43 U.S.C. §§ 1331–56 (Supp. II 1978), provides the exclusive authority for the development of minerals on the outer continental shelf. 43 U.S.C. § 1332(a) (1976); *Lowe* v. *Union Oil Co. of California*, 487 F.2d 477 (9th Cir. 1973) *cert. denied*, 417 U.S. 931 (1974). Claims for mineral deposits on the outer continental shelf cannot be established under the general mining law, and such claims are therefore invalid. *Id.* Because the claims are clearly invalid, BLM properly refused to accept them for recordation under sec. 314 of FLPMA. 43 U.S.C. § 1744 (1976).[2]

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[1] Presumably, he means the definition given to "public lands" by section 103(e) of FLPMA, 43 U.S.C. § 1702(e) (1976), which specifically excludes lands on the outer continental shelf.

[2] The BLM decision also noted that the subject lands are not subject to appropriation under the Oil Placer Act, Feb. 11, 1897, ch. 216, 29 Stat. 526 (1897). This holding was not contested by appellant. Although that statute was never specifically and directly repealed, it has effectually been supplanted by sec., 37 of the Mineral Leasing Act of Feb. 25, 1920, ch. 85, 41 Stat. 437, 451 (1920), which provided that deposits of certain minerals, such as oil, would be subject to disposition only as provided in the Mineral Leasing Act. Thus, no oil placer claims could be located after that Act under the mining laws. The fact that Congress made separate provision for OCS mineral leasing in the Outer Continental Shelf Lands Act makes clear that legislation regarding onshore minerals was not considered to extent to Federally owned offshore mineral deposits.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON
Administrative Judge

WE CONCUR:

FREDERICK FISHMAN
Administrative Judge

JAMES L. BURSKI
Administrative Judge

DOYON, LIMITED

5 ANCAB 77

Decided *October 10, 1980*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F–19155–20.

Reversed in part; stipulation approved.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands: Department of the Interior Instructions, 44 L.D. 513 (1916)

Construction and maintenance of an authorized Federal improvement on public lands under principles of Department of the Interior *Instructions*, 44 L.D. 359 (1915) and 44 L.D. 513 (1916), does not cause an appropriation of land affected and thus does not affect the right of selection by a Native corporation under the provisions of ANCSA.

2. Patents of Public Lands: Department of the Interior Instructions, 44 L. D. 513 (1916)

The Federal interest retained in an authorized improvement constructed and maintained under principles of *Instructions*, 44 L.D. 513 (1916), is limited to the improvement itself. The exception for the improvement is inserted in a patent for the purpose of giving public notice that the improvement is there; eliminating the improvement from the conveyance; and for assuring any attendant right of the Federal Government to go onto the land for purposes consistent with its ownership in the improvement.

3. Alaska Natives Claims Settlement Act: Definitions: Public Lands: Department of the Interior Instructions, 44 L.D. 513 (1916)

Inasmuch as the Federal interest in an improvement constructed and maintained on public land pursuant to *Instructions*, 44 L.D. 513 (1916), does not effect a segregation of, nor is it an interest in, the land itself, but is limited to the improvement, it cannot be considered as a possible exception to being "public land" within meaning of § 3(e)(1) of ANCSA.

4. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes

Lands affected by construction and maintenance of a linear pipeline under principles of *Instructions*, 44 L.D. 513 (1916), are not "lands withdrawn or reserved for national defense purposes" within the meaning of the exception in § 11(a)(1) of ANCSA.

5. Patents of Public Lands: Department of the Interior Instructions, 44 L.D. 513 (1916)

A notation on the land records of a 44 L.D. 513 interest must be removed, and no reservation of such interest can be included on subsequent patents, when the subject improvement is no longer needed or used for or by the United States.

6. Alaska Native Claims Settlement Act: Definitions: Public Lands: Department of the Interior Instructions, 44 L.D. 513—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Settlement Approval

Where the record is uncontested and supports a factual finding that the United States no longer uses or needs an improvement pursuant to the principles of *Instructions*, 44 L.D. 513 (1916), the Board can accept a stipulation by the parties to remove the reservation of interest from a conveyance document.

APPEARANCES: Elizabeth S. Taylor, Esq., for Doyon, Ltd.; Shelley J. Higgins, Esq., Office of the Attorney General, for State of Alaska; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

Doyon, Ltd., appeals Bureau of Land Management decision to include in a Decision to Issue Conveyance reservation of the Haines-Fairbanks pipeline right-of-way, and of the right to operate and maintain the same so long as needed or used by the United States.

The issue decided is whether the Board will approve a stipulated agreement between Appellant, Doyon, Ltd., and the Bureau of Land Management that the pipeline right-of-way shall not be reserved to the United States in the conveyance document.

The right-of-way is noted on the public land records as a 44 L.D. 513 interest.[1] While both Doyon, Ltd. and the Bureau of Land Management agree that the reservation should be deleted from conveyance to Doyon, there is substantial disagreement both as to the effect of a 44 L.D. 513 interest, and the circumstances under which such an interest is terminated.

These disagreements raise questions of law which could prevent the Board from approving the stipulated agreement. For this reason, the Board rules on the questions of law raised in this appeal, prior to ruling on the stipulated agreement.

The Board determines that the Federal interest retained pursuant to *Instructions*, 44 L.D. 513, is limited to the improvement—in this case, the pipe itself—and therefore such interest does not cause any appropriation of the underlying land; that the Federal interest is not excepted from withdrawal or selection under ANCSA by either § 11(a)(1) or § 3(e)(1); and that the Federal interest retained pursuant to *Instructions*, 44 L.D. 513, terminates when the improvement is no longer needed or used for or by the United States. The Board concludes there are no legal impediments to approving the stipulated agreement and that the record of this appeal con-

[1] 44 L.D. 513 notations are notations to the land records made by the Bureau of Land Management pursuant to *Instructions* set forth at page 513 of volume 44 of the Land Decisions issued on Jan. 13, 1916. Reference is also made to 44 L.D. 359 issued Aug. 31, 1915.

tains sufficient factual basis to support a conclusion that Federal use and occupation of the linear pipeline has ceased.

Therefore, the Board approves the parties' stipulation that the Haines-Fairbanks pipeline right-of-way shall not be reserved to the United States in the conveyance document to Doyon.

Procedural Background

On Apr. 2, 1975, Doyon, Ltd. (Doyon) filed selection application F-19155-20, *as amended*, under provisions of § 12(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611(c) (1976 and Supp. I 1977)) for lands withdrawn pursuant to § 11(a)(1) for Native Village of Northway.

On June 23, 1978, the Bureau of Land Management (BLM) issued a Decision to Issue Conveyance (DIC) including land in T. 15 N., R. 19 E., C.R.M., affected by this partial decision. The DIC specified the grant of lands shall be subject to a reservation of the Haines-Fairbanks pipeline right-of-way, as follows:

> The conveyance issued for the surface and subsurface estates of the lands described above shall contain the following reservations to the United States:
>
> 1. That Haines to Fairbanks pipeline right-of-way, F-010143, fifty (50) feet in width, and all appurtenances thereto, constructed by the United States through, over, or up on the land herein described and the right of the United States, its agents or employees, to maintain, operate, repair, or improve the same so long as needed or used for or by the United States.

On July 31, 1978, Doyon filed a Notice of Appeal. In its Statement of Reasons and Memorandum filed on Sept. 26, 1978, Doyon asserts several errors in the DIC including reservation of the Federal interest in the Haines-Fairbanks pipeline system right-of-way.

On Nov. 8, 1978, BLM filed an Answer which concedes the merit of Doyon's position regarding the 44 L.D. reservations. BLM states that the General Services Administration (GSA) claims a property interest in the entire pipeline right-of-way including the pump stations and the pipe itself.

On Dec. 15, 1978, BLM filed a supplemental answer agreeing with Doyon's contention "that the reservation of the [pipeline] right-of-way cannot be upheld on the basis of the 44 L.D. 513 notation alone." Further, BLM asserts that any interest can only be reserved in the United States pursuant to ANCSA under provision of § 3(e) or § 17(b). BLM again states that GSA claims some manner of property interest in the pipeline right-of-way and requests the Board act appropriately.

On Dec. 20, 1978, the Board issued an order naming GSA as a necessary party to this appeal and giving that agency 30 days within which to respond to briefings of the parties relating to the Haines-Fairbanks pipeline right-of-way (F-010143). The GSA did not make an

appearance in response to the Board's order.

On July 23, 1979, the Board ordered the issue of 44 L.D. 513 notation as it relates in this appeal of Haines-Fairbanks pipeline right-of-way, F–010143, to be segregated from the remaining issues, closed the record and set final briefing. In addition, specific inquiries were made to all parties relating to 44 L.D. 513 notation.

On Aug. 30, 1979, Doyon filed response and on Sept. 10, 1979, BLM filed response to Board's order of July 23, 1979.

On June 26, 1980, Stipulation was filed by BLM and Doyon in which it is agreed that "the Haines-to-Fairbanks Pipeline right-of-way, F–010143, shall not be reserved to the United States in the proposed conveyance of lands to Doyon, Limited."

Factual Background

Congress authorized construction of the Haines-Fairbanks petroleum products pipeline system by the Department of the Army on Sept. 28, 1951 (65 Stat. 336).

The United States and Canada entered into an agreement on June 30, 1953 (4 U.S.T. 2223 (1953); T.I.A.S. No. 2875) (U.S.-Canada Agreement), which authorized the construction of an oil pipeline system from Haines to Fairbanks, Alaska, passing through northwestern British Columbia and Yukon Territory. The purpose of the agreement was to maintain the pipeline system until such time as the Permanent Joint Board on Defense decided that there was no further need for the system.

On Jan. 20, 1953, the U.S. Army Corps of Engineers requested the District Land Office, Department of the Interior, that, pursuant to Departmental Instructions of Jan. 13, 1916 (44 L.D. 513), a notation be placed on the tract books of lands affected by the 50-foot right-of-way for linear pipeline from the border of Canada to Ladd Air Force Base, Alaska.

Land involved in this partial decision, *i.e.*, Sec. 34, T. 15 N., R. 19 E., C.R.M., was in the public domain at the time a 44 L.D. 513 notation for a 50-foot right-of-way was placed on the public land records by BLM on Jan. 22, 1953 (Fairbanks Serial 010143).

The Haines-Fairbanks products pipeline system was constructed during 1954–1955 and was fully operational by 1958. Construction and maintenance was thereafter performed by the U.S. Army Corps of Engineers for the Department of Defense.

In May of 1970, the Department of the Army determined that the pipeline system was no longer needed.

On June 17, 1971, the Assistant Secretary for the Department of Defense made the decision to declare the pipeline system excess.

The House Armed Services Committee approved this decision on Mar. 13, 1973.

On June 7, 1973, the Army through the Real Estate Division of the Alaska District, Corps of Engineers, filed a Preliminary Report of Excess concerning disposal of the system.

In August of 1973, the Army filed with BLM a notice of intention to relinquish the military withdrawal here in question.

On July 23, 1976, GSA determined the Haines-Fairbanks pipeline property, including the linear pipe, to be surplus after no need or authorized use of the entire pipeline system had been demonstrated by a Federal agency.

In October 1978, the U.S.–Canada Permanent Joint Board on Defense formally declared there was no further need for the pipeline system.

Decision

Negotiations between the governments of Canada and the United States culminated in an agreement on June 30, 1953, authorizing construction of the Haines-Fairbanks petroleum products pipeline system for the mutual defense of both countries. Federal interest in the pipeline system located on public lands in Alaska was protected either by withdrawals made by Public Land Order (PLO) [2] or under principles of *Instructions* by Department of the Interior in 44 L.D. 513.

This partial decision addresses the question of whether a Federal interest in the linear portion of the Haines-Fairbanks pipeline system, reserved in a DIC to Doyon under principles of Department of the Interior's *Instructions*, 44 L.D. 513, can be deleted from the conveyance document as a result of a stipulated agreement signed by Doyon and BLM?

By regulation 43 CFR 4.913(b), the Board must approve stipulations which require action or forbearance of action by the Department of the Interior. (*Appeal of Northway Natives, Inc.*, 4 ANCAB 247 (1980) [VLS 78–57].)

Approval of a stipulation by the Board is tantamount to a finding that there are no legal or factual impediments of record which would prevent resolution of the issues in the manner stipulated. In this appeal, the result stipulated is the deletion of a reservation of Federal interest from a decision to convey land pursuant to ANCSA.

While BLM and Doyon are in agreement that the DIC should contain no reservation of interest in the linear pipeline, the parties are in substantial disagreement as to the effect of a 44 L.D. interest as well as the circumstances under which a 44 L.D. 513 interest is terminated. The Board here rules on the ques-

[2] This Board considered the effect of a PLO (for a pump station facility) along the pipeline system on lands selected by a Native village corporation under ANCSA. (*Appeal of Tanacross, Inc.*, 4 ANCAB 173, 87 I.D. 123 (1980) [VLS 78–51].) The Board concluded that PLO withdrawals for the pump station facilities along the pipeline were "lands withdrawn or reserved for national defense purposes" and were therefore excepted from withdrawal for selection under provision of § 11 (a)(1) of ANCSA. Because the issue of this partial decision does not include any lands withdrawn by PLO, the Board's decision in *Appeal of Tanacross, Inc., supra*, is inapplicable.

tions of law raised in this appeal which would otherwise prevent the Board from approving the stipulation.

Both Doyon and BLM agree that the purpose of a 44 L.D. notation is to provide notice on public record of the Government improvement and to assure protection of the improvement by inserting a clause excepting the improvement in subsequent patents.

Doyon states that a 44 L.D. 513 interest causes neither a reservation nor a withdrawal of lands. Asserting that the pipeline has not been used for years, Doyon argues it has been actually abandoned as is evidenced by Notice of Intention to Relinquish filed by the Army, and as the right-of-way is inextricably related to the Federal improvement there can be no interest reserved.

Doyon stresses that the United States use and occupancy of the pipeline had terminated and any effect of 44 L.D. 513 ceased. Further, that the 44 L.D. 513 notation of Haines-Fairbanks pipeline was not for national defense purposes within exception of § 11(a)(1) of ANCSA since it was not a withdrawal by PLO.

BLM states that the principle underlying a 44 L.D. 513 *Instructions* is that the authorized construction of a Federal improvement by a Federal agency on public land *appropriates* the land used and occupied by the improvement.

While the BLM states that the appropriation exists only for so long as the improvements are used and occupied by the United States, BLM disagrees with Doyon's assertion of abandonment. BLM argues that a 44 L.D. improvement is a Federal interest in land which must be conveyed unless it comes within one of the exceptions of ANCSA. Concluding the pipeline reservation does not come within any of the exceptions, BLM states it must be conveyed.

To resolve these differences, it is useful to review the origin of 44 L.D. 513 *Instructions* and the result intended by the Department of the Interior.

Prior to 1915, when the Department issued the *Instructions* found in 44 L.D. 359, it found itself in a dilemma. The parameters of that dilemma are described in the case of *M. R. Hibbs*, 42 L.D. 408 (1913).

Hibbs had applied for land under the Act of June 11, 1906 (34 Stat. 233), which permitted homestead entry in a national forest in accordance with the general homestead laws. The Forest Service requested that a roadway crossing land applied for by Hibbs be reserved in his patent. The Department had previously ruled that such roadways could be reserved in patents issued pursuant to the homestead laws.

The entry laws under which Hibbs was entitled to obtain his patent no express provision for reservation of such a roadway nor did it authorize the insertion in patents of any conditions, restrictions or reservations not specifically provided for in existing laws.

The Department reconsidered its earlier ruling, and declared that it was without authority to insert any restrictions, limitations or reservations in a patent issued under homestead entry law unless specifically authorized to do so by statute. The underlying principle is that an agency cannot add restrictions to a patent unless authorized to do so by Congress when issuance of patent is mandatory upon an entryman's full compliance.

Since there was no provision in the statute allowing reservation of a roadway easement, no such reservation could be inserted in the patent. The Department added that since the easement could not be reserved, the alternative to assure protection of the Federal interest would be to exclude such affected land from entry.

The effect of the holding in *Hibbs, supra*,[3] was to preclude the Department from reserving a Federally-built improvement in a patent unless specifically allowed to do so by the statute under which entry is made and patent issued. The method used to protect such Federal improvements on public lands would be to exclude the affected land from entry.

The alternative—to exclude the improvement while conveying the land—resulted when the Department of the Interior issued *Instructions*, 44 L.D. 359, on Aug. 31, 1915. These Instructions were issued in response to a request by the Secretary of Agriculture to reserve telephone lines and right-of-way crossing lands within a national forest which had been entered under homestead laws. The Instructions were prefaced with a statement of the Department's problem of retaining the Federal interest in improvements constructed and maintained on lands open to entry under public land laws in view of prohibition to make such reservations as held in *Hibbs, supra*, as follows:

> The lands having been so devoted to a public purpose, pursuant to a law of Congress, subsequent disposition thereof will not, in the absence of an express conveyance by the United States, operate to pass title to the patentee to such telephone lines or the right of the United States to operate and maintain the same. On the other hand, under the circumstances of these cases, it seems unnecessary and inadvisable to reserve from disposition and eliminate from the entries and patents definite tracts or areas of land for the protection of such lines.
>
> 44 L.D. 359.

This statement reflects the Department's position that Federal interest in an authorized improvement constructed and maintained on public lands could not be disposed of without specific intent to do so, and, that such improvement appropriated the affected land in such manner that it was unavailable for entry consistent with the holding in *Wilcox, infra.*

[3] In *Solicitor's Opinion*, M–36071, 60 I.D. 477 (May 16, 1951), the Department of the Interior reiterated its position that: "Where a statute places upon this Department the mandatory duty of conveying lands to persons who meet certain requirements prescribed in the legislation, the Department cannot impose upon such persons additional requirements or convey to them rights less than those provided for by Congress."

It was the Department's expressed purpose in these Instructions to formulate a means of assuring retention of Federal ownership in an improvement constructed on public lands without causing any change of public land status.

It is believed that the solution of the matter is to convey all of the lands included within the area described in any such homestead entry, and all rights appurtenant thereto, except the property of the United States, namely, telephone line and appurtenances and the right of the United States to maintain and operate the same so long as it shall be necessary. This may be accomplished by excepting the aforesaid property of the United States and the rights necessary and incident thereto from the conveyance. In other words, *instead of conveying the property subject to an easement, no conveyance should be made of the telephone line or rights appurtenant thereto.* [Italics added.]

You [Commissioner of the General Land Office] are accordingly advised as follows: in cases where telephone lines or like structures have been actually constructed upon the public lands of the United States, including national forest lands, and are being maintained and operated by the United States, and your office is furnished with appropriate maps or field notes by the Department of Agriculture so prepared as to enable you to definitely locate the constructed line, proper notation thereof should be made upon the tract books of your office and if the land be thereafter listed or disposed of under any applicable public-land law, you should insert in the register's final certificate and in the patent when issued the following exception:

"Excepting, however, from this conveyance that certain telephone line and all appurtenances thereto, constructed by the United States through, over, or upon the land herein described, and the right of the United States, its officers, agents, or employees to maintain, operate, repair, or improve the same so long as needed or used for or by the United States."

44 L.D. 359–360.

Instructions given on Jan. 15, 1916, in 44 L.D. 513, provided an elaboration of principles expressed in 44 L.D. 359, by extending this concept to protecting other types of Federal improvements made pursuant to authorized appropriation acts.

I am of the opinion that the same reasoning as adopted in the Department's instructions of August 31, 1915, to the Commissioner of the General Land Office, relative to telephone lines constructed under authority of similar appropriation acts applies to the other kinds of improvements mentioned in the above act of March 4, 1915; and that similar exceptions as to lands needed for such improvements may be inserted in the register's final certificate, and in the patent when issued. * * * [T]he case should be one of either actual construction, or in which the evidence shows that the construction has been provided for, and will be immediately undertaken.

44 L.D. 513, 515.

The Board concludes the intended purpose of the Department of the Interior's *Instructions*, 44 L.D. 359, and in 44 L.D. 513 was, first, to assure retention of Federal ownership in authorized improvements constructed and maintained on public lands by excepting such improvement from an ensuing patent; and second, to assure that the continued existence and use of the Federal improvement would not prohibit conveyance of public lands.

The Board disagrees with BLM's contention that an authorized improvement protected by a 44 L.D. 513 notation causes an appropriation of land within the meaning of cited authorities. Such appropriation would effectively change the public land status and thereby prohibit conveyance under ANCSA.

BLM cites several authorities to describe the manner and effect of appropriation caused by a Federal improvement on public lands under *Instructions* found in 44 L.D. 513.

The landmark case of *Wilcox* v. *Jackson*, 38 U.S. (3 Pet.) 498 (1839), is cited by BLM as precedent for the principle that authorized acts of use and occupation by the Federal Government appropriates the affected land so that the land is severed from the public domain and is not subject to entry under the general land laws.

The case involved an attempt to gain title to land located in Fort Dearborn, Illinois. The Fort had been established by Act of 1804, and had been intermittently occupied and vacated as a military post over a period of years. Jackson and his predecessors in interest had, by claims of possession and of rights under preemption laws, sought ownership of a portion of the original military site. Although Jackson's attempts of entry would have been otherwise allowable, they were denied because of the prior appropriation.

The court found, that as a result of the congressional acts establishing the Fort, and the factual events which occurred on the land, the land had been appropriated by the Federal Government, stating:

> Now this is an appropriation, for that is nothing more nor less than setting apart the thing for some particular use.

38 U.S. 512. And further:

> But as we go farther, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.

38 U.S. 513.

In *United States* v. *R. G. Crocker*, 60 I.D. 285 (1949), the Department of the Interior affirmed BLM's dismissal of a protest by the Forest Service against pending patents to mining claims. The Forest Service contended that the claims conflicted with an established administrative site. Appellant Crocker had filed application for mineral patent on land within a national forest which by statute were made available for mineral claims as though on public lands. Prior to the filing of these claims, the Forest Service had constructed structures and made improvements on a portion of an administrative site outside the limits of the mining claims. The Forest Service contended that any mining claim in conflict with the administrative site should be denied, though none of the land had been withdrawn from mineral location.

The Department found that the portion of the administrative site within the mining claim limits was unimproved and not exclusively and continuously occupied by Government structures or personnel. Since the issue in dispute involved only the unimproved portion of the Forest Service administrative site the Department held that the unimproved land was not withdrawn from mining location by virtue of any use by the Forest Service.

However, the Department left no doubt that had the mining claims been in conflict with portions of the administrative site on which Forest Service's improvements were located, the lands would have been so firmly appropriated as to preclude any mining location on land occupied by those structures.

The Forest Service also protested issuance of mining patents to Crocker because of a 44 L.D. 513 interest in existing telephone lines and a constructed roadway on lands covered by the mining claims. Rather than deny issuance of mining claim patent to Crocker, BLM held that these Federal improvements would be *excepted* from the patent, if issued, in accordance with *Instructions*, 44 L.D. 359 (1915).

In *United States* v. *Schaub*, 103 F. Supp. 873 (D.C. Alaska 1952), *aff'd*, 207 F.2d 325 (9th Cir. 1953), the court held that Forest Service had made such an appropriation of land by improvements and use of a gravel pit in a national forest as to preclude the filing of mining claims. Schaub had filed a mining claim, allowable as on public land generally in the national forest, on a gravel site which had been used intermittently by the Forest Service for road building purposes for some years prior to the filing. The court asserted such use by Forest Service was in furtherance of lawful obligations and that such use was itself notice of actual possession. The court found that even though the lands had not been withdrawn from entry, any mining claims would be invalid due to the proper appropriation caused by use and occupation by the Forest Service.

In *A. J. Katches*, A–29079 (1962), the Department held that prior construction of a lookout tower and road by the Forest Service, in a national forest, appropriated the lands and they were thereafter not subject to location under mining laws. The Department found only the extent of such appropriation would be subject to additional hearing.

In the case of *A. W. Schunk*, 16 IBLA 191 (1974), the Forest Service contested the validity of mining claims as being in conflict with a transmission line right-of-way permit issued to a private utility. The permit was issued under statutory provision which expressly stated that such permit could confer no interest in the land and did not close the land to operation of general land laws.

BLM found that Schunk's mining claims did conflict with the property covered by the transmission right-of-way and were therefore

332-468 O - 80 - 2 : QL 3

invalid, reciting such decision to be in accordance with principles contained under *Instructions*, 44 L.D. 513.

The Department found the terms of such permit to be nonexclusive and affirmed adherence to doctrine of appropriation of land by Government occupation and use which prevented operation of general land laws as in *Wilcox* v. *Jackson*, *supra*, and in *Schaub*, *supra*. While stating such doctrine formed the basis for 44 L.D. 513, the Department at the same time, asserted that Government improvements did not withdraw the land, rather such improvements were to be noted and excepted from the patent as in *Crocker*, *supra*.

The Department held that Schunk's mining claims could not be found invalid on basis of 44 L.D. 513, as the permit was issued to a private utility which could not be deemed use and occupation by the Government within the ambit of these Instructions. The Board did note that, in any event, the protection for the improvement could be no more than that noted in *Crocker*, *supra*, *i.e.*; the improvement to be noted and excepted from an ensuing patent while not affecting the land.

The above cases consistently hold that even in the absence of a formal land withdrawal an authorized use and occupancy, which has been factually established by structures or other physical improvements on public land by a Federal agency, appropriates the affected land in a manner tantamount with being an interest in the land itself. Such an appropriation precludes the right of entry or claim which would be otherwise allowable under the general public land law.

The only case in which the effect of a 44 L.D. 513 notation was an actual issue in dispute clearly holds to the contrary. *Crocker*, *supra*, states that an improvement classified under a 44 L.D. 513 notation does not appropriate an interest in the land, but rather is a procedure whereby the improvement is expected from ensuing patents.

The term "appropriation" as used in the cases cited by BLM has a meaning analogous with the terms "withdrawn" or "reserved" insofar as the result is to segregate the land from entry. The result of such "appropriation" in these cases is that the previous land status has effectively been altered and lands affected thereby are no longer available for entry or claim.

The effect of an improvement constructed pursuant to *Instructions*, 44 L.D. 513, is clearly distinguishable because, by the terms of the Instructions, the improvement cannot infringe upon the interest of land ownership otherwise available under applicable public laws. Any contrary result would be anthesis to the reason for formulation of *Instructions*, 44 L.D. 513, as described previously.

[1] Construction and maintenance of an authorized Federal improvement on public lands under principles of Department of the In-

terior *Instructions*, 44 L.D. 359 and 44 L.D. 513, does not cause an appropriation of land affected and thus does not affect the right of selection by a Native corporation under the provisions of ANCSA.

The requirement that an appropriate notation be placed on BLM's land status maps provides procedural notice of Federal ownership in the improvement. Neither the notation nor the improvement effects the status of the land.

[2] The Federal interest retained in an authorized improvement constructed and maintained under principles of *Instructions*, 44 L.D. 513, is limited to the improvement itself. The exception for the improvement is inserted in the patent for the purpose of giving public notice that the improvement is there; eliminating the improvement from the conveyance; and for assuring any attendant right of the Federal Government to go onto the land for purposes consistent with its ownership in the improvement.

Because the interest retained under *Instructions*, 44 L.D. 513, is limited to the improvement, it is only the improvement that can be excepted from the patent.

Therefore, aside from the question of whether the Board can accept the stipulation to delete the reservation in the DIC, the Board finds that the BLM erred in describing the interest in the DIC. The conveyance purports to "reserve" to the United States the "Haines to Fairbanks pipeline right-of-way, F–010143, fifty (50) feet in width." [4]

A Federal interest retained pursuant to *Instructions*, 44 L.D. 513, can only be excepted, rather than reserved, from the conveyance document; and the interest excepted is limited to the improvement and its appurtenances. The language of the DIC properly retains the right of the United States to go onto the land as necessary to perform all rights and obligations of ownership of the improvement. The record of this appeal shows that other sections of the Haines-Fairbanks pipeline have been excepted from patents in the manner consistent with this ruling.[5]

As to the question of whether the interest in the pipeline is an exception from the definition of "public lands" in § 3(e) of ANCSA, the Board concurs with BLM's conclusion that there is no basis for a § 3(e) determination. However, the Board disagrees with BLM's premise for this conclusion.

Sec. 3(e) defines public lands (available for selection by Native

[4] BLM regulations refer to the use of principles of *Instructions*, 44 L.D. 513, in 43 CFR, Subpart 2800, which is the General Right-of-Way section. The ruling that only the improvement can be excepted from ensuing patents does not conflict with this reference in the regulations.

[5] "Excepting however from this conveyance that certain pipeline and all appurtenance thereto, constructed by the United States through, over, or upon * * * and the right of the United States, its officers, agents, or employees to maintain, operate, repair or improve the same, so long as needed or used for or by the United States." (Doyon's Response to Order Closing Record (Haines to Fairbanks Right-of-way), dated 8–28–79, Exhibit A, p. 12, Patent No. 1229079 issued 10–11–62.)

Corporations) as "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation."

BLM states that the extended period of nonuse of this portion of the pipeline is sufficient to preclude making a § 3(e)(1) determination. Implicit in such argument is the premise that a 44 L.D. 513 interest is normally subject to a § 3(e) determination.

The Board has concluded that the effect of a Federal improvement constructed and maintained under *Instructions*, 44 L.D. 513, does not cause segregation of the land so as to prevent application of entry or claim under public land laws. It is the salient feature of the origin and purpose of *Instructions*, 44 L.D. 513, that the retained Federal interest be limited to the improvement itself which is to be excepted from the patent rather than be an interest in the land which would limit or restrict the patent. An improvement constructed by the Federal Government under a 44 L.D. 513 notation is not land and thus cannot be "land actually used" within the definition of § 3(e)(1).

[3] The Board finds that inasmuch as the Federal interest in an improvement constructed and maintained on public land pursuant to *Instructions*, 44 L.D. 513, does not effect a segregation of, nor is it an interest in, the land itself, but is limited to the improvement, it cannot be considered as a possible exception to being "public land" within the meaning of § 3(e)(1) of ANCSA.

The next question is whether the interest was excepted from withdrawal within the meaning of § 11(a)(1) of ANCSA, and therefore is not selectable under ANCSA.

The language of this section specifically excepts from withdrawal for selection by Native corporations, "lands withdrawn or reserved for national defense purposes."

In *Tanacross, Inc., supra*, the Board found that the pump stations for the pipeline, which had been withdrawn by PLO, came within the exception of § 11(a)(1) and therefore were not withdrawn for selection pursuant to ANCSA. Thus, the affected lands could not be selected, even though the Federal Government had excessed the pump stations. The Board ruled that at the time ANCSA withdrawals become effective, the PLO and the treaty establishing the national defense character of the PLO were in effect and that no auxiliary actions, such as procedures to excess, could defeat a PLO or change its character.

This Board, in *Paug-Vik, Inc., Ltd.*, 3 ANCAB 49. 56, 85 I.D. 229, 235 (1978). concluded that the terms "withdrawn or reserved" are used interchangeably for purpose of determining lands excluded from selection under § 11(a)(1) of ANCSA. It follows that if lands affected by a 44 L.D. 513 notation are neither withdrawn nor reserved, such lands do not come within the exception of § 11(a)(1).

[4] The Board therefore finds, in agreement with BLM and Doyon, that lands affected by construction and maintenance of a linear pipeline under principles of *Instructions*, 44 L.D. 513, are not "lands withdrawn or reserved for national defense purposes" within the meaning of exception to withdrawal of lands under § 11(a)(1) of ANCSA.

Having determined that a 44 L.D. 513 interest does not appropriate the land so as to bring it within the exceptions of either § 3(e)(1) or § 11(a)(1) of ANCSA, the question remains as to the means of terminating a 44 L.D. 513 interest.

Both Doyon and BLM agree, in general terms, that a 44 L.D. 513 interest fails under its own terms when the improvement ceases to be needed or used by the United States. Both agree that it is the fact of nonuse and lack of need that terminates the effectiveness of a 44 L.D. 513 interest, as opposed to the necessity for a formal revocation by the Secretary of the Interior to terminate the effectiveness of a PLO withdrawal.

The parties seriously disagree on the legal principles under which the pipeline interest should be terminated. Doyon argues actual abandonment, as evidenced especially by the decision to surplus the property by GSA in July of 1976. The BLM disagrees that a finding within the legal nuances of abandonment doctrine would be appropriate. BLM argues that the issue need not be resolved because of 44 L.D. 513 interest appropriates the land; all Federal interest in land must be conveyed within a § 11(a)(1) withdrawal unless such interest is excepted under other provisions of ANCSA; a 44 L.D. 513 interest does not fit within any of the exceptions; therefore it must be conveyed.

The Board does not accept BLM's argument, having ruled that a 44 L.D. 513 interest is not an interest in land. Since a 44 L.D. 513 interest is not an interest in land it is not conveyed under ANCSA, and must be excepted from patents issued under ANCSA unless it terminates by its own terms.

[5] The Board concurs with the parties and finds that a notation on the land records of a 44 L.D. 513 interest must be removed, and no reservation of such interest can be included on subsequent patents, when the subject improvement is no longer needed or used for or by the United States.

The Board concurs with BLM in that there is no necessity to rule on the doctrine of abandonment within the meaning of the cases cited. In this appeal, since BLM was signatory to a Stipulation (June 6, 1980) in which it was agreed that the Haines-Fairbanks pipeline right-of-way, F–010143, shall not be reserved to the United States in the proposed conveyance document, it is uncontested that the pipeline is no longer used for or by the United States. Therefore, no ruling is necessary on degree of evidence required to terminate a 44 L.D. 513 interest.

[6] The Board concludes that where the record is uncontested and supports a factual finding that the United States no longer uses or needs an improvement constructed pursuant to the principles of *Instructions*, 44 L.D. 513, the Board can accept a stipulation by the parties to remove the reservation of interest from a conveyance document.

The file record of this appeal documents various events which provide the basis for a factual determination as to whether all Federal interest in the linear pipeline has terminated pursuant to the *Instructions*, 44 L.D. 513.

The record discloses that in May 1970, the Army determined there was no further military requirement for supply through the Haines-Fairbanks pipeline system; the decision to excess the pipeline system was made in 1971; in 1973, the Army filed a Preliminary Report of Excess concerning disposal of the system; in 1976 the GSA determined the linear pipeline to be surplus; in 1978, the U.S.–Canada Permanent Joint Board on Defense, determined there is no further need for the Haines-Fairbanks pipeline.

Therefore, based on the file record of this appeal, the Board approves the Stipulation filed by BLM and Doyon on June 26, 1980, and Orders BLM to delete the reservation of the Haines-Fairbanks pipeline right-of-way, F–010143, from the DIC here appealed, and to make appropriate amendments to the land records involved.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

CENTRAL OIL AND GAS, INC.

2 IBSMA 308

Decided *October 23, 1980*

Cross appeals by Central Oil and Gas, Inc., and the Office of Surface Mining Reclamation and Enforcement, from a Mar. 11, 1980, decision of Administrative Law Judge Sheldon L. Shepherd sustaining seven violations and vacating the remaining violation in Notice of Violation No. 79–III–17–26 (Docket No. IN 9–21–R).

Affirmed in part; reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Generally—Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands

Where a surface coal mining operation affects previously mined lands, the fact that an alleged violation could have existed before the present operation does not relieve the permittee from responsibility for the violation.

2. Surface Mining Control and Reclamation Act of 1977: Roads: Generally

The exception clause in sec. 522(e)(4) of the Act is not intended to allow mining activity near the junction of a mine access or haul road with a public road;

its purpose is merely to allow access or haul roads to join public roads by excepting them from the setback requirement.

APPEARANCES: Rolland E. Laughbaum, Esq., Galion, Ohio, for Central Oil and Gas, Inc.; Mark Squillace, Esq., Stefan Nagel, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Central Oil and Gas, Inc. (Central), and the Office of Surface Mining Reclamation and Enforcement (OSM) have each appealed from the Mar. 11, 1980, decision of Administrative Law Judge Sheldon L. Shepherd upholding violation Nos. 1, 2, 3, 4, 5, 7, and 8 of Notice of Violation No. 79–III–17–26 and vacating violation No. 6 of the same notice. For the reasons stated below, we affirm that part of the decision upholding the seven violations and reverse that part of the decision vacating the one violation.

Background

On Aug. 13, 1979, two OSM inspectors conducted an inspection of Central's surface coal mining operation in Jefferson County, Ohio.[1] Two inspectors returned to the site on Aug. 15, 1979, and following further inspection, issued Notice of Violation No. 79–III–17–26 pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[2] The notice contained eight alleged violations.

On Nov. 10, 1979, Central applied for review of the notice. Following a hearing held in Steubenville, Ohio, on Feb. 27, 1980, Administrative Law Judge Shepherd issued his Mar. 11, 1980, decision. On Mar. 21, 1980, Central filed a notice of appeal with the Board seeking review of the seven violations sustained by the Administrative Law Judge. On Mar. 31, 1980, OSM filed a cross appeal of that part of the decision vacating one violation. The parties' briefs have been submitted.

Discussion

[1] Central's general response to all the violations charged in the notice was that the area in question had been the subject of mining for 40 years prior to the commencement of Central's activities in 1978 and, therefore, it could not be held liable because OSM failed to show who initially created the problems. This argument, per se, is without merit. Mining on previously mined lands did not relieve Central of its duty to comply with the initial regulatory program regulations.[3] Central

[1] The permit (No. C–869) covering this operation was issued by the State of Ohio on May 5, 1978.

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1271(a)(3) (Supp. II 1978).

[3] The permit in this case was issued after the effective date of the Act. Sec. 502(c) of the Act, 30 U.S.C. § 1252(c) (Supp. II 1978), established the effective date as May 3, 1978. 30 CFR 710.11(a)(3)(ii) provides that "[o]n and after May 3, 1978, any person conducting coal mining operations shall comply with the initial regulatory program."

did not attempt to rebut any of the alleged violations by presenting evidence that might have alleviated its responsibility for those violations.[4] Central merely relied on cross-examination of an OSM inspector to elicit from him testimony that for some of the violations the conditions could have been created prior to May 3, 1978. Such a concession falls far short of rebutting a prima facie case that a violation existed on the date of inspection.

Since Central presented no independent evidence in this case, the issue for resolution is whether OSM presented sufficient evidence to establish a prima facie case as to each of the violations. *See Burgess Mining and Construction Corp.*, 1 IBSMA 293, 86 I.D. 656 (1979); *James Moore*, 1 IBSMA 216, 86 I.D. 369 (1979). Based on the testimony of the OSM witnesses and the photographs and documentary evidence produced by OSM at the hearing, we conclude that OSM met its burden of establishing a prima facie case that Central:

1. Mined within 100 feet of a stream in violation of 30 CFR 715.17(d)(3) (violation No. 1);

2. Failed to cover all exposed coal seams and acid-forming and toxic-forming materials in violation of 30 CFR 715.14(j) (violation No. 2);

3. Established a stream ford without regulatory authority approval in violation of 30 CFR 715.17(*l*)(2) (violation No. 3);

4. Failed to direct all surface drainage through a sedimentation pond prior to leaving the permit area in violation of 30 CFR 715.17(a) (violation No. 4);

5. Affected areas outside the permit area in violation of sec. 502(a) of the Act, 30 U.S.C. § 1252(a) (Supp. II 1978) (violation No. 5);

6. Failed to meet the effluent limitations for discharges from the area affected by its operation in violation of 30 CFR 715.17(a) (violation No. 7);[5]

7. Failed to mark topsoil storage piles in violation of 30 CFR 715.12(f) (violation No. 8).

[2] Violation No. 6 charged that Central had affected an area within 100 feet of the outside right-of-way of a public road in violation of sec. 522(e)(4) of the Act by storing topsoil in that area.[6] The Administrative Law Judge vacated that violation, concluding that OSM failed to establish a prima facie case. That conclusion was error. It was based in part on a misinterpretation of the exception language in

[4] A permittee who affects previously mined lands has the opportunity of making arrangements with the regulatory authority concerning its activities on such lands. *See, e.g.*, 30 CFR 715.14(b). Central apparently did not avail itself of that opportunity.

[5] The record indicates that the sampling done by OSM to support this violation was accomplished at two locations off the permit area (Tr. 34; Exh. R–6). While the best evidence to support a violation of this nature would be an analysis of a sample which was taken at the point of discharge from the permit area, Central presented no evidence that the effluent limitations were any different at the permit boundary than at OSM's sampling locations.

[6] Sec. 522(e)(4) (30 U.S.C. § 1272(e)(4) (Supp. II 1978)) reads in pertinent part:

"After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—

* * * * *

"(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line."

sec. 522(e)(4). The exception is not intended to allow mining activity near the junction of a mine access or haul road with a public road. The legislative history of the Act clearly demonstrates that the purpose of the exception clause is merely to allow access and haul roads to join public roads by excepting the former from the setback requirement.[7]

The Administrative Law Judge also based his conclusion in part on his finding that OSM failed to show when the topsoil piles had been placed in the location in question. OSM provided evidence that established the existence of topsoil piles within 100 feet of a public road in the area disturbed by Central's operation (Tr. 31–32; Exh. R–16). That evidence was sufficient to establish a prima facie case. Central failed to rebut.

That part of the decision which affirmed violation Nos. 1, 2, 3, 4, 5, 7, and 8 as properly issued is affirmed; that part which vacated violation No. 6 is reversed.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

BLACK HAWK RESOURCES CORP.

50 IBLA 399

Decided *October 24, 1980*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting high bid in competitive oil and gas lease sale. W 71493.

Reversed and remanded.

1. Oil and Gas Leases: Generally—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: Competitive Leases

Although under the Departmental regulations a competitive bidder in an oil and gas lease sale, must, where there is another party in interest, submit the signed statements required by 43 CFR 3102.7, failure to comply with the regulation does not require rejection of the bid. This result follows because in noncompetitive offerings the critical element is determining the first qualified offeror. For competitive bidding, the amount of the bid replaces priority of filing as the dominant factor.

[7] The exception language was originally suggested in 1975 by the Ford Administration. The Senate Committee on Interior and Insular Affairs reviewed the suggestion and stated:

"19. *Haul roads. Recommendation:* 'Requirements of S. 425 could preclude some mine operators from moving their coal to market by preventing the connection of haul roads to public roads. The Administration's bill would modify this provision.'

"*Committee Comment:* This was not the intent of S. 7.

"*Committee Recommendation:* Adopt Administration amendment." S. Rep. No. 28, 94th Cong., 1st Sess. 191 (1975). The exception language was included in S. 7 as reported out of Committee. During debate on the Joint Conference bill (H.R. 25) of that session, which contained the clause, the following statement was made by Rrepresentative Mink:

"Again, in my judgment, none of these modifications has done serious harm to the basic integrity of the act. For example, unintended moratoriums on surface mining, an inadvertent ban against connecting haul roads to public highways and needless interference with long term contracts between producers and consumers of coal were exposed and cleared up." 121 Cong. Rec. 13382 (1975).

APPEARANCES: Ralph R. Wilkerson, President, Black Hawk Resources Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

This appeal is from a decision dated June 27, 1980, by the Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's high bid for parcel 29 of the competitive oil and gas sale held on June 4, 1980. The bid was rejected because appellant failed to certify as to acreage limitations under 43 CFR 3102.2–2 (45 FR 35156 (May 23, 1980)) and to submit statements required under 43 CFR 3102.2–7(b) (45 FR 35156 (May 23, 1980)), which provides:

> A statement, signed by both the offeror or applicant and the other parties in interest, setting forth the nature of any oral understanding between them, and a copy of any written agreement shall be filed with the proper Bureau of Land Management office not later than 15 days after the filing of the offer, or application if leasing is in accordance with subpart 3112 of this title. Such statement or agreement shall be accompanied by statements, signed by the other parties in interest, setting forth their citizenship and their compliance with the acreage limitations of §§ 3101.1–5 and 3101.2–4 of this title.

An attachment to appellant's bid form indicated that Black Hawk Resources Corp. owned 66⅔ percent of the bid and Juniper Petroleum Corp 33⅓ percent. Juniper's qualification file number was also given.

Appellant concedes on appeal that it inadvertently omitted to certify as to acreage limitations as required by 43 CFR 3102.2–2. Appellant further states that the division of bid ownership between it and Juniper, as indicated on the attachment, "was the extent of the verbal agreement" between the parties. Appellant suggests that the attachment satisfied the requirements of 43 CFR 3102.2–7.

[1, 2] 43 CFR 3120.1–4 specifically requires bidders for competitive leases to comply with the regulations in subpart 3102. Since Juniper was another party in interest, sec. 3102.2–7 required a statement signed by both Black Hawk and Juniper as to the nature of any oral agreement between them. It also required a statement, signed by Juniper, setting forth *its* citizenship and compliance with the acreage limitation. The instructions on the back of appellant's bid form fully advise the bidder of all regulatory provisos which must be met if a bid is to be properly executed.

The Board vis-a-vis *noncompetitive offers* has held that failure to file the statements required by 43 CFR 3102.2–7 must result in rejection of the lease offer. *See*, for example, *H. J. Enevoldsen*, 44 IBLA 70; 86 I.D. 643 (1979); *William R. Curtis*, 37 IBLA 124 (1978). The Secretary's duly promulgated regulations have the force and effect of law and must be complied with. *See Elizabeth Pagedas (On Reconsideration)*, 40 IBLA 21 (1979), and

cases there cited. At first blush, it might appear that since appellant failed to comply with mandatory regulations the State Office properly did reject its bid.

In *North American Coal Corp.*, 74 I.D. 209 (1967), the Department addressed itself to the failure of a high bidder to timely submit with his bid a statement of his citizenship and coal lease interests.

North American discusses the difference between competitive and noncompetitive offerings as follows:

> The Department's usual rule, at least for noncompetitive dispositions of mineral leases or permits, is that an offeror who fails to comply with a mandatory requirement of a regulation is not a qualified applicant and is not entitled to priority until the defect is cured. *Ruby Company*, 72 I.D. 189 (1965); *Virgil V. Peterson*, A-30685 (March 30, 1967).
>
> * * * * *
>
> Where competitive bidding is permitted, however, price replaces time as the primary criterion for determining who will be awarded a lease or permit. Competitive bidding is based upon the underlying assumption that all bidders have an equal opportunity to compete upon a common basis with other bidders.
>
> North American argues that the integrity of the bidding system would be compromised if the Department permitted a late filing of a required statement. It points out that a bidder could withhold his deposit until he determined whether he wanted to complete his bid and then, after an opportunity to reevaluate the desirability of a lease, file or not file the deposit as he sees where his interest lies.
>
> This argument assumes that all requirements are equally important so that none can be neglected lest some bidder gain an unfair advantage. We agree that if a bidder could withhold his bid deposit without penalty he would be in a much better position than other bidders. However, since the consequences of permitting deviations in so important an aspect of competitive bidding as the bid deposit would be so destructive to the orderly conduct of lease sales, such a lapse would not be excused. See *Malcolm N. McKinnon*, A-29979, A-29996 (June 12, 1964).
>
> A statement relating to citizenship and other holdings, however, is on a different footing. We must assume that the bidder is qualified or else there would be no reason for him to participate in the sale. If he is qualified, there does not seem to be any advantage accruing to him from failing to file the required statements.
>
> The only penalty provided by the regulations for failure of a high bidder who has been awarded a lease to complete the steps necessary to its issuance, such as payment of the first year's rental, submission of a bond, signing the lease, is forfeiture of the bid deposit. 43 CFR 3132.4-3(b). Thus, every high bidder has an opportunity for a second guess if he is willing to part with his deposit, and one who has omitted to submit a statement required with his bid deposit has no option not open to any other high bidder.
>
> The Comptroller General has recognized that failure to comply with a mandatory requirement of a bid invitation, even though prescribed by regulation, does not always necessitate rejection of the bid.
>
> In a recent decision he restated the considerations pertinent to determining when deviations from the provisions of an advertisement for bids may be allowed:
>
> "Whether certain provisions of an invitation for bids are to be considered mandatory or discretionary depends upon the materiality of such provisions and whether they were inserted for the protection of the interests of the Government or for the protection of the rights of

bidders. Under an advertised procurement all qualified bidders must be given an equal opportunity to submit bids which are based upon the same specifications, and to have such bids evaluated on the same basis. To the extent that waiver of the provisions of an invitation for bids migh [*sic*] result in failure of one or more bidders to attain the equal opportunity to compete on a common basis with other bidders, such provision must be considered mandatory. However, the concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids. *It does not confer upon bidders any right to insist upon the enforcement of provisions in an invitation, the waiver of which would not result in an unfair competitive advantage to other bidders by permitting a method of contract performance different from that contemplated by the invitation or by permitting the bid price to be evaluated upon a basis not common to all bids. Such provisions must therefore be construed to be solely for the protection of the interests of the Government and their enforcement of waiver can have no effect upon the right of bidders* to which the rules and principles applicable to formal advertising are directed. To this end, the decisions of this Office have consistently held that where deviations from, or failures to comply with, the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required of the bidder in the event he is awarded a contract, a failure to enforce such provision will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive. 45 Comp. Gen. 221, 223 (1965), quoting 40 Comp. Gen. 321, 324 (1960)." [Italics supplied.]

74 I.D. at 210–212.

That distinction is further mentioned in a footnote in *Alaska Oil and Minerals Corp.*, n.1, 29 IBLA 224, 231, 84 I.D. 114, 118 (1977), as follows:

A key distinction was made in this decision [North American] between bids on competitive mineral leases and offers on noncompetitive mineral leases. For noncompetitive mineral lease offers, strict compliance with regulations is required because the essential element is determining the *first* qualified offeror. For competitive lease offers, however, the amount of the bid replaces priority of filing as the determining factor. *Id.* at 211; *Ballard E. Spencer Trust, Inc.*, 18 IBLA 25, 28 (1974), *aff'd*, *Ballard E. Spencer Trust, Inc.* v. *Morton*, 544 F.2d 1067 (10th Cir. 1976); *Silver Monument Minerals, Inc.*, 14 IBLA 137, 139 (1974). [Italics in original.]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to BLM to afford appellant a reasonably limited opportunity to make the necessary showings, *e.g.*, 30 days from service of notice. Upon compliance therewith the lease is to issue to appellant, all else being regular.

FREDERICK FISHMAN
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

CLARENCE RUNS AFTER
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, AND CHEYENNE RIVER SIOUX TRIBE

8 IBIA 170

Decided *October 27, 1980*

Appeal from decision by area director upholding superintendent's denial of refund and refusal to terminate payments from appellant's Individual Indian Money account made pursuant to an assignment of income claimed by appellant to be invalidated by his discharge in bankruptcy.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Acts of Agents of the United States

Where review is sought of action by BIA officials disbursing IIM account funds pursuant to agency regulation, their handling of the disbursements is reviewable by the IBIA under 25 CFR 2.3.

2. Indians: Civil Rights—Indians: Indian Civil Rights Act of 1968

A complaint that transfer of funds from an IIM account violates due process provisions of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1976), lies outside the review authority of the Department of the Interior.

3. Indian Lands: Allotments: Alienation—Indian Lands: Assignments

An Indian tribe, seeking to enforce debt collection of loan secured by mortgage of trust lands and assignment of income from trust lands executed more than 1 year prior to bankruptcy, presented an assignment of trust income executed in conformity with 25 CFR 109.4 to BIA officials responsible for administration of appellant's IIM account. The security interest thus obtained in appellant's trust lands by the tribe is a perfected security interest which attaches to the fund and entitles the tribe to the payments made by the agency officials despite appellant's intervening adjudication of bankruptcy.

APPEARANCES: Clarence Runs After, appellant, pro se; Wallace G. Dunker, Esq., Aberdeen Field Solicitor, for appellee area director.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On July 6, 1960, appellant executed a note for $13,500 secured by a mortgage of 268 acres of appellant's trust lands in Dewey County, South Dakota, to the Cheyenne River Sioux Tribe (tribe) under tribal loan agreement No. 326. Earlier, on Apr. 12, 1960, he had executed an assignment to the tribe under agreement No. 326 authorizing payments to the tribe from income received from his trust lands into his Individual Indian Money account (IIM account), to be applied towards satisfaction of the loan in the event of his default of payments on the

loan.[1] Both the mortgage and income assignment were approved by the agency superintendent concerned. Quarterly payments on the loan began on Jan. 15, 1961, and continued until Oct. 15, 1970. Meantime, appellant was adjudged a bankrupt on Oct. 9, 1963 (No. BK 63-94-C, U.S.D.C., D.S.D). Following adjudication, appellant protested the involuntary application of trust income from his IIM account towards payment of the tribal loan by the agency. In 1976 he made a formal written demand that the payments stop and that he be reimbursed for payments taken over his objection. Both the Bureau of Indian Affairs (BIA) superintendent and the area director concerned opined that agency transfer of the IIM funds was permissible as an exception to the rule that the bankruptcy law bars collection of discharged debts, on the theory that the transaction involved was an informal collection procedure outside the contemplation of the Bankruptcy Act, the Act of July 1, 1898, Ch. 541, 30 Stat. 544, *as amended*, 11 U.S.C. §§ 1 through 1103 (1976). The matter is now before this Board pursuant to 25 CFR 2.19(b), upon direct referral by the Commissioner of Indian Affairs.

Appellant seeks to obtain reimbursement of all amounts paid since his discharge in bankruptcy under the 1960 assignment together with an order preventing future diversions of his trust monies to the tribe through the use of the assignment. Relying upon *Aubertin* v. *Colville Confederated Tribes*, 446 F. Supp. 430 (E.D. Wash. 1978), appellant contends that collection of the debt through presentation of an assignment to the agency is barred by sec. 17 of the Bankruptcy Act, 11 U.S.C. § 35 (1976). He contends

[1] In pertinent part, the assignment provides:

"In consideration of the granting of a loan to the undersigned under the terms of loan agreement No. 326 the undersigned hereby assigns to the lender as security for repayment of such loan, the following: (a) All property, except land, which is now or may in the future be held in trust for the undersigned by the United States; (b) all income from trust land in which the undersigned now has or may in the future acquire an interest; (c) any income from any source and any funds from any source accruing to the individual Indian account of the undersigned.

"Any income received from the lands held in trust by the United States Government or any income received from the sales of personal property.

"The undersigned hereby grants to the superintendent of the agency under which the lender is operating, full right, power and authority to demand, collect, sue, or receipt for any property and income of the undersigned, and to apply such income on the indebtedness of the undersigned to the lender. If payment is not made as set forth in the loan agreement of the undersigned, said superintendent or his authorized agency may take possession of any trust property or income of the undersigned, and dispose of the same in accordance with instructions of the Commissioner of Indian Affairs, and apply the proceeds on said indebtedness.

"The undersigned does hereby appoint said superintendent as the undersigned's attorney to execute such leases on any trust land in which the undersigned now has, or may in the future acquire an interest, as the attorney may find necessary to facilitate repayment of the loan. The undersigned hereby gives the attorney power to do everything necessary in the making of such leases as fully as the undersigned could do, and hereby ratifies all that the attorney shall lawfully do or cause to be done under this authority.

"It is understood that in the case of death of the undersigned, this assignment and power to lease shall constitute a claim against trust funds, income, or trust property superior to that of the heirs of the undersigned."

also that the taking of his IIM account monies was in violation of due process requirements of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1976).

The area director, represented on appeal by the field solicitor, denies that any effective objection to the continued involuntary collection by BIA of the debt for the tribe was voiced by appellant following his discharge in bankruptcy. He also contends that, even if the debt was not revived by involuntary payments made subsequent to discharge, the collection process used by the BIA on behalf of the tribe was so informal as to constitute a payment obtained without official process of any kind, taking it outside the operation of the bankruptcy statute. An added argument is made that property of an Indian bankrupt is exempt property within the meaning of the Bankruptcy Act provisions codified at 11 U.S.C. § 24 (1976), and that, since the secured trust property could not pass to the trustee in bankruptcy (as it would otherwise have done), the debt which the mortgage and assignment of income secured remained unaffected by the discharge in bankruptcy. To support this proposition, reliance is placed upon a line of Federal cases including *In Re Penn*, 41 F.2d 257 (D. Okla. 1929); *In Re Denison*, 38 F.2d 662 (W.D. Okla. 1930); and *In Re Russie*, 96 F. 609 (D. Or. 1899).

Appellant's analysis of the issue presented concludes that the continued use of appellant's trust account by agency officials to pay the tribal loan following the discharge of the debt in bankruptcy violates 25 CFR 104.9 [2] by permitting pay-

[2] The Departmental regulation is interpreted by the Bureau of Indian Affairs in its Indian Affairs Manual at 42 IAM 6.3.3E(21)(h), which provides:

"(h) *Assignments of Trust Income.* Future income may not be obligated to third parties but may be assigned to secure loans. Form 5–845 (Revised), Assignment of Income From Trust Property, when approved by the Superintendent under authority delegated by Section 2.134 of Aberdeen Redelegation Order No. 2 Amdt. 5 (14 IAM 4), is recognition of a lender's right to demand and receive income from the trust land described thereon from the Superintendent, upon default of an Indian borrower, and to apply such upon the indebtedness in accordance with the terms of the note or other evidence of indebtedness. This assignment form, however, is effective only if the payments relating to the loan are not made by the Indian borrower, to the lender as agreed upon. The Superintendent should not honor demand requests until he has first ascertained (1) that the Indian borrower has defaulted, and (2) that the lender has exhausted all other means of effecting collection from the borrower in accordance with the terms of the agreement before resorting to demand against the assignment. Credit extended to Indians on open account, installment contracts, or conditional sales contracts does not qualify as a loan and Forms 5–845 shall not be approved therefor. A point to be borne in mind in connection with this form is that the three parties involved are: (1) The Indian borrower (2) the Superintendent, and (3) the lender. Form 5–845 does not make provisions for reflection of a specified amount. This is determined by the Superintendent after receipt of demand correspondence from the lender. Any checks drawn by the ISSDA in payment therefor, shall be pursuant only to specific Form 5–139b signed by the Superintendent or his designated representative. The Form 5–139b should contain the statement 'Funds obligated under contractual arrangements approved in advance.' '25 CFR 104.9' should be cited as the authority for the disbursement."

ments from his IIM account which are prohibited by an Act of Congress, the Bankruptcy Act. The appellee's analysis of the matter focuses upon the remedy sought rather than the agency conduct complained of, and concludes that, for various reasons, neither of the remedies sought—refund of monies taken nor prevention of future takings of tribal money—is available to appellant as a matter of law.

Although the parties seemingly disagree concerning whether there was a reaffirmation of the debt in loan No. 326, the administrative record indicates their disagreement concerns the effect of known facts rather than the facts themselves.[3] The issue is not whether there was a reaffirmation, but whether the agency must give effect to the 1963 bankruptcy decree. Finally, the question is raised, if the Bankruptcy Act does regulate agency administration of this matter, what action should be taken to properly apply the law to the circumstances described.

[1] Suggestion is made that the collection effort on behalf of the tribe by the BIA is not reviewable because it is not an agency action concerning which review is possible under 25 CFR 2.3. Because the subject of this matter is the transfer of IIM account funds claimed to be in violation of agency regulation establishing the method for handling such funds, the decision to continue to make the disbursements objected to by appellant is within the class of administrative action described by 25 CFR 2.3(a), since it involves a decision of an official under the supervision of an area director of the BIA not previously approved by the Secretary. Accordingly, it is concluded the Commissioner of Indian Affairs correctly referred the matter to this Board for review pursuant to 25 CFR 2.19(b).[4]

[2] Since the decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), it appears that review of complaints claiming deprivations of rights under the Indian Civil Rights Act of 1968, the Act of Apr. 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1301–1341 (1976), is outside the authority of this agency. The sole issue on appeal therefore concerns the application of the Bankruptcy Act to the conduct of agency business under 25 CFR 104.9 in making transfers from appellant's trust account.

[3] The Bankruptcy statute is an Act of universal application, which

[3] Appellant's brief at page 1 recites that collections from the trust account were made over his protest and that "[r]ecently, the tribe attempted to get him to sign * * * [a reaffirmation of the debt] but he refused." The Bureau response to this assertion is that "[t]he appellant falsely asserts that he made no such arrangement [referring to the assignment of income], with the tribe and also falsely asserts that there now exists no agreement." Answer Brief at 4.

[4] It should be noted, however, that the area director's action in dispute was appealed to the Commissioner in May 1977. While the appeal to the Commissioner could have been referred to the Board 30 days later absent agency action (25 CFR 2.19), the matter was not referred to this Board until Jan. 14, 1980.

applies to all individuals and Government agencies equally as it does to all other segments of American society. *In Re Stineman*, 155 F.2d 755 (3d Cir. 1946), *reversed on other grounds sub nom., United States National Bank* v. *Chase National Bank*, 331 U.S. 28 (1947); *In Re Minot Auto Co.*, 298 F. 853 (8th Cir. 1924). Nothing in the Bankruptcy Act nor in the character of the tribe as a sovereign entity is inconsistent with a finding that the Act's provisions are binding upon all the parties to this matter.[5] (*Cf. Morongo Band of Mission Indians* v. *Bureau of Indian Affairs*, 7 IBIA 299, 86 I.D. 680 (1979), declaring the Highway Beautification Act of 1965 inapplicable to Indian reservations.)

Contrary to appellee's contentions, the conduct of formal action by the BIA, an official Governmental agency, to enforce a security instrument previously approved pursuant to statute and agency regulation is not an informal collection device. It is official action, similar to court process. *See Girardier* v. *Webster College*, 563 F.2d 1267 (8th Cir. 1977).[6] In this case, agency action resulted in foreclosure of the assignment given by appellant to secure his debt to the tribe. *In Re Penn*, above, and related decisions cited by appellee merely hold that trust assets which are not subject to legal process in a direct action against the bankrupt beneficiary of the trust cannot be taken for the benefit of creditors by the bankruptcy trustee. The cited cases were decided before passage of the Act of Mar. 29, 1956, 70 Stat. 62 (25 U.S.C. § 483a (1976)), permitting mortgage of Indian trust lands under certain circumstances and authorizing foreclosure or sale of the land in the event of default. The provisions of this statute, as implemented by 25 CFR 121.34, apply to the trust lands of appel-

[5] The *Aubertin* decision, cited above, although now overruled by *Martinez* in its holding that the plaintiff could maintain an action under the Indian Civil Rights Act, observed that tribal sovereignty and powers of self-government are not infringed by a finding that the Bankruptcy Act applies to Indian tribes:

"I find that allowing a bankruptcy discharge to operate against the Tribes in this case will not undermine tribal institutions. Defendant is engaged in the business of lending money, following loan practices similar to those of any non-Indian lender operating in the commercial money market. Its claims that its loan program would be hurt if a discharge in bankruptcy is effective against it may be true. But it does not necessarily follow that its business activities should therefore constitute internal tribal affairs free from the reach of applicable federal laws. The Tribes' loan transactions are commercial activities properly subject to the Bankruptcy Act. Section 17c(3) of the Bankruptcy Act, 11 U.S.C. 35(c)(3), provides that the bankruptcy court shall determine the dischargeability of any debt not excepted under Section 17a. For the reasons stated above, I conclude that the Bankruptcy Act is an implied waiver of tribal immunity and that the bankruptcy court has the authority to discharge plaintiff's debt to the Colville Confederated Tribes." 446 F. Supp. 430, 435 (1978).

[6] The court summarizes the rule thus: "The usual usage of 'process' denotes activation of the formal legal machinery of a government but not refusals by a nonpublic person to act." 563 F.2d at 1273 (1977).

332-468 O - 80 - 3 : QL 3

lant whose mortgage and assignment were approved by the agency acting within its statuory mandate. As those rules are here applied, the execution of the security agreements in full conformity to the regulatory scheme established a perfected security interest in favor of the tribe within the purview of the Bankruptcy Act. *Cf.*, *In Re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

Thus, the mortgaging statute, 25 U.S.C. § 483a (1976), has the effect of placing a mortgagee of Indian trust lands in the same position as any secured creditor of land when confronted by a bankrupt mortgagor. It was proper under the law prior to 1978 for such a creditor to claim his secured interest by proceeding against the security in the appropriate forum. Usually the forum would be a state court. In this case, the appropriate forum was the BIA office charged with administration of assignments of IIM accounts. Since the assignment of income was a perfected security interest under applicable agency regulations governing such transactions, the tribe was entitled to take its security interest by obtaining payments through BIA from appellant's IIM account. Under the circumstances, therefore, the tribe proceeded as it was entitled to do under the bankruptcy law since the perfected lien it held on the IIM account effectively placed the security in the possession of the tribe under agency regulations.[7]

Appellant does not suggest that the security interest held by the tribe was improperly obtained, or should have been included in his assets taken by the trustee. While, as he argues, the bankruptcy law applies to this case, that law merely requires that reference be had to the applicable law, state or Federal, which defines the rights of the parties to the security transaction. *Rosenberg* v. *Rudnick*, 262 F. Supp. 635 (D. Mass 1967). The assignment given by appellant to the tribe was made more than a year before bankruptcy. Under the circumstances of this transaction it appears a perfected security agreement under Federal law was in effect against ap-

[7] The secured creditor under the Bankruptcy Act as it applied to this case prior to the Act's major revision by the Act of Nov. 6, 1978, 92 Stat. 2549, 11 U.S.C. § 101 (Supp. II 1978), had several courses of action open. It could seek to be included as general creditor (11 U.S.C. § 93(g) (1976)), or could pursue the security for satisfaction of the claim (11 U.S.C. § 93(h) (1976)). *United States National Bank* v. *Chase National Bank, supra.* The tribe chose to pursue the latter course. The alternative courses of action available are described in the *Chase Bank* opinion at 331 U.S. 33:

"Under these provisions, there are several avenues of action open to a secured creditor of a bankrupt. * * * (1) He may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession. * * * (2) He must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, inasmuch as that court has exclusive jurisdiction over the liquidation of the security. * * * (3) He may surrender or waive his security and prove his entire claim as an unsecured one. * * * (4) He may avail himself of his security and share in the general assets as to the unsecured balance." (Citations omitted.)

pellant's IIM account in 1963 and the payment of accruing amounts from the account was a proper administration of the security arrangement made. *See Grain Merchants of Indiana, Inc.* v. *Union Bank and Savings Company*, 408 F.2d 209 (7th Cir. 1969). (*See also* Anderson on the Uniform Commercial Code, 2d Ed. (1971) § 9–108:1 through 9–108:5; Uniform Commercial Code § 9–108.)

The reasoning in the *Aubertin* opinion, cited above, and principally relied upon by appellant, is directly applicable and controlling in this case. Here, as in *Aubertin*, money was withheld from an IIM account following default by a borrower soon to become a bankrupt; the tribe possessed a perfected security interest in the IIM account and foreclosed against the security so held; the intervening discharge was ineffective to prevent payment of the monies assigned from the bankrupt's IIM account.[8]

Since the regulatory requirements of 25 CFR 109.4 were met by the agency in administering the provisions of 25 U.S.C. § 483a (1976), and there was no regulatory conflict with any provision of the Bankruptcy Act then in force, appellee properly concluded that payments according to the terms of the previously approved assignment of income should be completed despite the intervening bankruptcy of appellant. The determination by the area director permitting continued application of appellant's IIM funds to loan account No. 326 until the debt is satisfied is affirmed.

This decision is final for the Department.

FRANKLIN ARNESS,
Administrative Judge

I CONCUR:

WM. PHILILP HORTON
Chief Administrative Judge

[8] The *Aubertin* opinion points out at n.5, 446 F. Supp. 432 (1978) and again at 446 F. Supp. 436, that the bankruptcy decree did not discharge specific debts, but merely ordered discharged those debts which were dischargeable. Under an amendment to the Act, not applicable here, the bankrupt Aubertin was able to litigate the question whether the tribe's debt was discharged. While in *Aubertin* the court was able to avoid a direct answer to the question, in this case the security interest is found to have survived discharge.

WALTER S. BROWN
v.
COMMISSIONER OF INDIAN AFFAIRS

8 IBIA 183

Decided *October 28, 1980*

Appeal from decision by Acting Deputy Commissioner of Indian Affairs denying appellant's request to gift deed a portion of his allotment on the Quinault Reservation to his nephew, also an owner of a Quinault allotment, on grounds that the nephew was not qualified under the Indian Reorganization Act to receive such a gift.

Reversed.

1. Indian Tribes: Membership

It is for the Indian tribe, not this Department, to determine composition of the tribe. In 1922 the Quinault Tribe did not recognize as members thereof any Indian of the reservation, but affiliate memberships were authorized for persons of one-quarter Quileute, Hoh, Chehalis, Chinook, or Cowlitz blood, under specified conditions.

2. Indian Lands: Allotments: Alienation—Indian Reorganization Act

In light of the unique hitsory of land ownership and Federal-Indian relations on the Quinault Reservation, any Quinault allottee living on June 1, 1934, should be entitled to receive other trust land on the reservation by gift deed in accordance with the provisions of secs. 5 and 19 of the Indian Reorganization Act (25 U.S.C. §§ 465 and 479 (1976)).

APPEARANCES: Daniel L. Van Mechelen, Seattle, Washington, for appellant; James R. Kuhn, Jr., Esq., Office of the Regional Solicitor, Portland, Oregon, for respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Walter S. Brown has appealed from a decision rendered Sept. 21, 1979, by Acting Deputy Commissioner of Indian Affairs, Theodore C. Krenzke, wherein it was held that appellant could not gift deed a portion of his allotment located on the Quinault Indian Reservation (Allotment No. Q 1674) in trust to his nephew, Daniel L. Van Mechelen, holder of a trust patent on the Quinault Reservation.

The Quinault Reservation is governed by the provisions of the Indian Reorganization Act of June 18, 1934 (IRA), 48 Stat. 984, 25 U.S.C. §§ 461–486 (1976), *as amended*. Sec. 5 of the Act, codified at 25 U.S.C. § 465, generally authorizes the gift conveyance of trust land to an Indian or Indian tribe. Sec. 19 of the Act, codified at 25 U.S.C. § 479, defines the term "Indian" for, among other purposes, determining who may receive a gift conveyance of an allotment in trust status. This section reads in pertinent parts as follows:

§ 479. Definitions

The term "Indian" as used in sections 461, 462, 463, 464, 465, 466–470, 471–473, 474, 475, 476–478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

The above section denotes three means by which an individual may be considered an Indian for certain IRA purposes, including, as pertinent herein, eligibility to receive a conveyance of trust land located on an IRA reservation. The issue in this appeal is whether Daniel L. Van Mechelen, the proposed recipient of a gift of trust land located on the Quinault Reservation, satisfies

any of the "Indian" definitions set forth in 25 U.S.C. § 479.

Summary of Bureau's Position

The Commissioner's Office held that Mr. Van Mechelen does not satisfy the eligibility requirements of sec. 479 because: (1) he is only one-eighth Indian blood (Cowlitz), precluding compliance with the statutory classification of "persons of one-half or more Indian blood"; (2) the Cowlitz Tribe, in which Mr. Van Mechelen is a member, neither now nor in the past has received Federal recognition, thereby precluding compliance with the statutory classification of "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"; and (3) although Mr. Van Mechelen is a descendant of a member of a recognized Indian tribe under Federal jurisdiction, he was, nevertheless, not a resident of the Quinault Reservation on June 1, 1934, precluding compliance with the residency requirement of sec. 479.

Appellant's Position

Appellant, who is represented in this matter by Mr. Van Mechelen, maintains that Indians who were allotted lands on the Quinault Reservation, even though not of Quinault blood, may not be deprived of benefits accorded individual Indians under the IRA, especially when such allottees appeared on the census roll for the Quinault Reservation when the IRA was enacted.

Preliminary Findings

The Bureau and appellant do not disagree as to the following. Mr. Van Mechelen is a member of the Cowlitz Tribe, which is not federally recognized. He is the owner of a trust patent located on the Quinault Reservation. The trust patent was granted by President Roosevelt on Apr. 21, 1933, pursuant to the Act of Mar. 4, 1911, 36 Stat. 1345. Mr. Van Mechelen possesses less than one-half degree Indian blood. When the IRA was enacted, Mr. Van Mechelen appeared on the official census roll of Indians of the Quinault Reservation. However, having been born on Sept. 22, 1928, he was not old enough to vote on the acceptance of the IRA, as were adult Indians of the Quinault Reservation.[1] Mr. Van Mechelen is a descendant of an Indian who, on June 1, 1934, was a member of a recognized Indian tribe under Federal jurisdiction. On June 1, 1934, Mr. Van Mechelen's actual residence was not within the boundaries of any Indian reservation.

Discussion, Other Findings, and Conclusions

Appellant's chief theory in this appeal is that notwithstanding that

[1] Sec. 18 of the IRA left the choice of whether or not the Act would apply to a particular reservation to a majority vote of the adult Indians of the reservation. *See* 25 U.S.C. § 478.

the present day Quinault Tribe fails to recognize Mr. Van Mechelen as a member thereof, as an "Indian of the Quinault Reservation" when the IRA was passed, Mr. Van Mechelen was a member of a federally recognized group of Indians at that time and, under the wording of sec. 19, he is presently entitled to the benefits of the IRA. According to appellant, the Bylaws of the Quinault Tribe from 1922 to 1965 recognize that the Quinault Tribe and "Indians of the Quinault Reservation" were one and the same entities. (Appellant's brief filed Aug. 29, 1980, at 3 and 7.)

As authority for the proposition that membership in a recognized tribe as of 1934 is sufficient to satisfy the requirements of sec. 19 of the IRA, appellant cites the beginning passage of the law which reads: "The term 'Indian' * * * shall include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*." (Appellant's emphasis.) We do not consider it necessary to dwell on the import of the phrase underscored above for the reason that appellant cannot show that Mr. Van Mechelen was a member of a federally recognized tribe on June 18, 1934 (the date of enactment of sec. 19). Accordingly, we are not persuaded that the Quinault (or Quinaielt) Reservation were "one and the same" when the IRA was passed.

Appellant's original position in this appeal was that there was no Quinault Tribe in 1934 but, instead, a group known as the "Indians of the Quinaielt Indian Reservation." (Notice of Appeal dated Oct. 29, 1979, at 1.) In support of this contention, appellant makes reference to bylaws adopted by the first council of this "group" on Aug. 24, 1922, entitled: "By-laws of the General Council of The Indians of the Quinaielt Indian Reservation." After counsel for the respondent bureau pointed out in its answer brief that the bylaws cited by appellant commence with the words, "We, the members of the Quinaielt Tribe of Indians of the Quinaielt Reservation," appellant replied as follows:

> Mr. Kuhn points out my contention that in 1934 there was no "Quinaielt Indian Tribe."—I stand corrected. Mr. Kuhn's "discovery" proves that the "Quinaielt Tribe of Indians of the Quinaielt Reservation" and the "Indians of the Quinaielt Indian Reservation" were one and the same in 1922 and 1965 (when the bylaws were amended) and all the years in between."

Reply Brief at 3.

[1] The Board does not accept the strained interpretation which appellant gives to the bylaws cited. First, it is for the Indian tribe and not this Department to determine composition of the tribe. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *United States* v. *Mazurie*, 419 U.S. 544 (1975); *Martinez* v. *Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915 (10th Cir. 1957). Second, the 1922 Bylaws of the Quinault Tribe, which were

in effect in 1934, identified the requirements necessary for membership in the tribe. Contrary to appellant's assertion, these bylaws did not authorize membership for any Indian of the reservation. Affiliate memberships were authorized, however, for persons of one-quarter Quileute, Hoh, Chehalis, Chinook, or Cowlitz blood under other specified conditions.[2]

Because appellant cannot show that the Quinault Tribe recognized Mr. Van Mechelen as a member thereof in 1934, and in the absence of any evidence that he was or is now a member of any other federally recognized tribe, Mr. Van Mechelen fails to satisfy the first definition of "Indian" set forth in 25 U.S.C. § 479.

The only definition which Mr. Van Mechelen can possibly satisfy under 25 U.S.C. § 479, in order to receive a gift conveyance of trust land, is as a descendant of a member of a federally recognized tribe who, on June 1, 1934, was residing within the boundaries of an Indian reservation.[3]

The above criterion is susceptible to several interpretations. There is first of all an ambiguity as from whom Congress expected residence on a reservation at the time prescribed. By memorandum dated Mar. 24, 1976, former Associate Solicitor for Indian Affairs Reid Chambers advised the Commissioner of Indian Affairs that the "descendant" rather than the tribal "member" must have resided within an Indian reservation on June 1, 1934. We agree with this interpretation and the reasons therefor. Appellant, whose cause would benefit from an opposite interpretation, does not challenge the requirement as stated.

[2] The difficult question is resolving whether the residency requirement of sec. 479 may be satisfied by "constructive residence" and, if so, the elements associated therewith. By memorandum dated June 14, 1976, former Associate Solicitor Chambers also expressed an opinion on this question:

> It is pointed out in the Joint Statement [of the Quinault Nation and Quinault Allottees Association of January 20, 1976] that some Quinault allottees who voted to accept the Indian Reorganization Act are now denied its benefits by the bureau policy of requiring actual residence on the Quinault Reservation rather than constructive residency which was purportedly required for voting on the Act in 1935. I can see no difference between actual and constructive residence in this situation. If the allottee is not a member of a federally recognized tribe, as provided in the first category of the statutory definition, and is less than one-half degree [Indian blood], thus not meeting the criterion of the third category, but is a descendant of a tribal member and himself voted as a Quinault allottee on the Reorganization Act, then that is a rebuttable presumption of their [*sic*] reservation residency. * * * I agree with the Joint Statement

[2] Article 1(b) of 1922 bylaws.

[3] Paraphrasing 25 U.S.C. § 479 which refers in part to "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation."

that persons receiving allotments on the Quinault Reservation and who voted on the Act should not now be denied its benefits.

In response to the above opinion, the Business Committee of the Quinault Indian Nation offered its views thereon in a statement to the Assistant Secretary for Indian Affairs dated July 24, 1978. It surmised from Mr. Chambers' opinion that non-adult person who were ineligible to vote in the IRA election would be unable to establish "constructive residency." With respect to this situation, the Business Committee stated: "It does not appear to be equitable to limit the concept of a rebuttable presumption of constructive residence on the reservation by denying that presumption to those who, but for their minority, would have had the opportunity of establishing it."

Notwithstanding the Associate Solicitor's opinion generally favoring under the law a constructive residency approach, and the specific consent of the Quinault Business Committee to the extension of this rule to persons possessed of trust interests on the Quinault Reservation who, but for their minority, could have voted on the application of the IRA to the Quinault Reservation, the Bureau of Indian Affairs has adhered, at least in the instance of Mr. Van Mechelen, to an actual residency requirement.

We believe an actual residency requirement is too restrictive for purposes of determining who may receive an *inter vivos* gift of trust land on the Quinault Reservation under the provisions of 25 U.S.C. § 465 (or under 25 U.S.C. § 483 which also provides for conveyances of trust property). In light of the unique history of land ownership and Federal-Indian relations on the Quinault Reservation, any Quinault allottee living on June 1, 1934, should be entitled to receive other trust land on the reservation by gift deed.

Relevant History of the Quinault Reservation

By the Treaty of Olympia, the Quinault and Quileute Tribes ceded to the United States almost all of the lands they claimed.[4] A provision of that treaty allowed the United States to later remove these tribes from their original reservation or reservations and consolidate them with "other friendly tribes or bands." In 1873 President Grant signed an Executive order setting the boundaries of the present Quinault Reservation for the benefit of the Quinault, Quileute, Hoh, Quit, and "other tribes of fish-eating Indians on the Pacific coast."[5]

Following passage of the General Allotment Act,[6] allotments were made to individual Indians on the Quinault Reservation. In 1911 Congress directed the Secretary of the Interior to make allotments on

[4] Treaty of July 1, 1855, and Jan. 25, 1856, 12 Stat. 971.

[5] Executive order of Nov. 4, 1873, 1 Kappler, Indian Affairs Laws and Treaties 923 (1903).

[6] Act of Feb. 8, 1887, 24 Stat. 388

the Quinault Reservation to "all members of the Hoh, Quileute, Ozette, and other tribes of Indians in Washington who are affiliated with the Quinaielt [a.k.a. Quinault] and Quileute Tribes * * * and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes." Act of Mar. 4, 1911, 36 Stat. 1345.

Following the 1911 Allotment Act, several court decisions were rendered interpreting the law. In *United States* v. *Payne*, 264 U.S. 446(1924), the Court disapproved of the refusal by the Bureau of Indian Affairs to make allotments of timberland, after the available grazing and agriculture land on the reservation had been allotted. In 1931 the Supreme Court held as too restrictive the Secretary's interpretation concerning which Indians were entitled to an allotment under the 1911 Act. *Halbert* v. *United States*, 283 U.S. 753 (1931). The Court there found that the Chehalis, Chinook, and Cowlitz Tribes were among those referred to by Congress in the Act as affiliated with the Quinault and Quileute Tribes. Further, the Court held that personal residence on the Quinault Reservation was not required to obtain an allotment.

After the *Halbert* decision the Department resumed the allotment process on the Quinault Reservation. With passage of the Indian Reorganization Act in 1934 the allotment of Indian reservation land in severalty to any Indian was ended. 25 U.S.C. § 461. A referendum on the adoption of the IRA was voted on by adult Indians of the Quinault Reservation on Apr. 13, 1935, pursuant to sec. 18 of the Act, resulting in acceptance of the IRA for the Quinault Reservation.[7]

Application of the IRA to Quinault Allottees

The respondent Bureau contends in this appeal that pre-IRA history on the Quinault Reservation is irrelevant to the effect and application of the IRA today:

> Mr. Van Mechelen received a trust patent pursuant to the Act of 1911 as construed in *Halbert* v. *United States*, *supra*, as a Cowlitz Indian and not because he was a member of a federally recognized tribe. The IRA was a wholly new scheme of land acquisition and under section 5 the Secretary is authorized in his discretion to acquire land in trust for those who are "Indians" as specifically defined in the Act. There is no interrelationship between the 1911 Act and patents issued thereunder and the provisions of the IRA.
>
> Answer Brief at 12.

We do not agree that it is impermissible for the Department to draw on pre-IRA history on the Quinault Reservation in interpret-

[7] The majority of the Indians actually residing on the reservation voted against acceptance of the IRA. The election was carried by "absentee voters." Memorandum to Commissioner of Indian Affairs from Superintendent, Taholah Agency, dated Sept. 4, 1935.

ing or applying IRA requirements.[8] Indeed, that is the very exercise which the Department performed in 1935 in determining the eligibility of Indians to vote in the IRA election pursuant to sec. 18 of the Act. Recognizing that there existed a large number of Quinault allottees who were absent from the reservation,[9] the Commissioner of Indian Affairs instructed the Superintendent of the Taholah Agency by memorandum dated Mar. 19, 1935, that reservation residence for purposes of determining eligibility to vote on application of the IRA could be actual or constructive. The Commissioner went on to instruct that in the case of constructive residence there must be a "certificate of the absentee voter that he is merely residing away temporarily and expects to return to the reservation." [10]

The Board perceives of no reason why constructive residence should suffice for participating in the IRA election under sec. 18, yet not suffice for purposes of receiving land in trust under secs. 5 and 19 of the Act.[11] Further, in view of the fact that all Quinault allottees became bound by the strictures of the IRA, whether or not they voted for its application to the Quinault Reser-

[8] In the recent Supreme Court decision, *United States* v. *Mitchell*, —— U.S. ——, 100 S. Ct. 1349 (1980), the Court examined the Secretary's trust obligations on the Quinault Reservation as envisaged by Congress in both the General Allotment Act and the Indian Reorganization Act. 100 S. Ct. 1349, 1351, 1358.

[9] In *Halbert*, the Court explained this absenteeism as follows:

"The Act of 1911 does not purport to make the right to an allotment dependent on a personal residence on the reservation. It is a special act relating only to this reservation. The land within the reservation is generally covered with a heavy growth of timber and is difficult of clearing. As a rule the Indians are poor and would be without means of supporting themselves while attempting to clear the land. The treaty secures to them the right of taking fish at all usual and accustomed grounds. Most of them are fishermen, but a few find employment in lumber camps. Most of them have for many years resided in small villages outside the reservation. Some of the villages are within small reservations made by executive orders; but the majority of the Indians have always lived outside any reservation." 283 U.S. 753, 760.

[10] The actual letter of instruction sent by the Agency Superintendent to absentee voters prior to the IRA election stated, among other things:

"[A]lthough you are absent from your reservation you should be entitled to vote on the Indian Reorganization Act * * * provided you are able to sign the enclosed statement to the effect you regard this reservation as your permanent home and legal residence * * *. This vote, or this law, places you under no obligations either to the Government or the tribe as to returning to the community or reservation."

[11] We do not reach the question whether "constructive residence" is sufficient for other matters in which residence may be required under the IRA. In this regard, it is noted that Mr. Van Mechelen, representing an association known as "Indians of the Quinault Reservation," has pursued an administrative appeal through the Commissioner of Indian Affairs concerning the alleged entitlement of such group to formally organize under the IRA. By decision dated Apr. 7, 1980, the Commissioner denied appellants' requested relief, incorporating the views of the Acting Associate Solicitor for Indian Affairs set forth in a memorandum to the Commissioner dated Mar. 18, 1980. Among other things, the Acting Associate Solicitor concluded in the foregoing memorandum: "It does not follow that the constructive residence in 1935 which was sufficient to entitle absent allottees to vote on the application of the IRA is sufficient 'residence' in 1980 to entitle them to demand the right to organize. This is particularly true since the 'constructive residence' of 1935 was based on an intention to return to the reservation, an intention which most of the allottees have not pursued."

vation,[12] the constructive residence test for secs. 5 and 19 purposes should not be limited to whether or not the allottee voted or was eligible to vote in the IRA election. Just as the General Allotment Act and the Allotment Act of 1911 permitted acquisition of allotments regardless of the allottee's age, the IRA contains no age limitation on eligibility to receive *inter vivos* conveyances of trust land. Accordingly, we hold that any Indian who was allotted land on the Quinault Reservation and who was living on June 1, 1934, constructively satisfies the residency requirement of sec. 19 of the IRA.

In addition to according equal treatment to original allottees of the reservation, the above rule promotes one of the major objectives of the IRA in that it allows reservation land to be preserved in trust status. Under the present policy of the Bureau, appellant in the case at bar could gift deed trust land to his nephew, but the land would have to be conveyed in fee.[13] Further, the rule as stated will narrow the gap between that which can be accomplished through *inter vivos* conveyances and that which can now be done by devise. *See* 25 U.S.C. § 464, *as amended* by the Act of Sept. 26, 1980, 94 Stat. 1207 (P.L. 96–363). This recent enactment is significant in that it was passed by Congress to relax IRA restrictions on the devise of trust property. Sec. 4 of the IRA as initially adopted by Congress permitted the devise of trust property only to the tribe upon whose reservation the land is located, to any member of such tribe, or to any legal heir of the testator. The Act of Sept. 26, 1980, now permits the devise of trust property by an Indian testator governed thereby to the testator's heirs, lineal descendants and to "any other Indian persons for whom the Secretary of the Interior determines that the United States may hold land in trust."

The Board has considered in this appeal whether 25 U.S.C. §§ 465 and 479 could be further interpreted as authorizing *inter vivos* conveyances of trust lands among any Indians possessed of trust allotments on the Quinault Reservation, consistent with the direction Congress has now taken with respect to testamentary conveyances on IRA reservations. We conclude that there is no legal basis for such an extended interpretation of present IRA requirements and that it is for Congress, if appropriate, to equalize the standards for *inter vivos* and testamentary conveyancing of trust or restricted property. The principle that rights and restrictions conferred on original allottees as recipients of trust patents run with the land (*see Estate of Louis Harvey Quapaw*, 4 IBIA 263, 82 I.D. 640 (1975)); *Couch* v. *Udall*, 404 F.2d 97 (10th

[12] Thus, for example, all allottees on the Quinault Reservation, whether or not members of the Quinault Tribe, saw legal title to their trust land vested in the United States indefinitely (section 2, IRA).

[13] Presumably, the legitimate aim of the Quinault Tribe to acquire land interests on the reservation is also frustrated when such interests are conveyed to others in fee.

Cir. 1968), has no application here. The "Indian" definitions set forth in 25 U.S.C. § 479 represent specific requirements which must be satisfied on an individual basis. Had Congress intended that any Indian possessed of a trust allotment on an IRA reservation could receive an *inter vivos* gift of similar land, it could easily have so provided.

Therefore, by virtue of the authority delegated to the Board of Indian Appeals under 43 CFR 4.1, the decision of the Acting Deputy Commissioner of Indian Affairs dated Sept. 21, 1979, denying appellant's proposed gift of trust property to his nephew, Daniel L. Van Mechelen, on grounds that such conveyance was prohibited by law, is reversed. This decision is final for the Department.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

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